Court of Appeals.

HENRY D. PALMER,

Respondent

AGAINST

ROBERT M. DE WITT,

Appellant

APPELLANT'S POINTS.

IRA D. WARREN,
Counsel for Defendant

LARNED & WARREN,
Defendant's Attorneys

NEW YORK:
RUSSELLS' AMERICAN STEAM PRINTING HOUSE,
Nos. 28, 30, 32 Centre Street.

1871.

Court of Appeals.

HENRY D. PALMER,
Respondent,
against
ROBERT M. DE WITT,
Appellant.

Appellant's Points.

Prior to the 1st day of February, 1868, T. W. Robertson, a resident of the City of London, and a citizen of Great Britain, composed a drama called "Play."

On the 1st day of February, 1868, Robertson, by an instrument in writing, and for a valuable consideration, sold, assigned and set over to the plaintiff in this case the exclusive right and privilege of *printing and publishing*, enacting, performing, representing and producing on the stage; licensing or permitting to be printed, published, enacted, performed, represented and produced on the stage, throughout the *United States*, the said drama, and all benefits to be derived therefrom, and delivered the manuscript of said drama to the plaintiff. On the 15th of February, 1868, and for a great number of times thereafter, the drama, "Play," was publicly performed and represented at the Prin[illegible] of Wales Theatre in the City of London, *by and with the sanction of the author*, in the presence of large audiences, with no notice or prohibition against carrying the same away and making such use of the same as any of the audience saw fit.

On the 25th of March, 1868, the defendant, a resident of New York City, and a citizen of the United States, printed and sold copies of the drama called "Play" in the City of

Court of Appeals.

HENRY D. PALMER,
Respondent,
against
ROBERT M. DE WITT,
Appellant.

Appellant's Points.

Prior to the 1st day of February, 1868, T. W. Robertson, a resident of the City of London, and a citizen of Great Britain, composed a drama called "Play."

On the 1st day of February, 1868, Robertson, by an instrument in writing, and for a valuable consideration, sold, assigned and set over to the plaintiff in this case the exclusive right and privilege of *printing and publishing*, enacting, performing, representing and producing on the stage; licensing or permitting to be printed, published, enacted, performed, represented and produced on the stage, throughout the *United States*, the said drama, and all benefits to be derived therefrom, and delivered the manuscript of said drama to the plaintiff. On the 15th of February, 1868, and for a great number of times thereafter, the drama, "Play," was publicly performed and represented at the Prin[illegible] of Wales Theatre in the City of London, *by and with the sanction of the author*, in the presence of large audiences, with no notice or prohibition against carrying the same away and making such use of the same as any of the audience saw fit.

On the 25th of March, 1868, the defendant, a resident of New York City, and a citizen of the United States, printed and sold copies of the drama called "Play" in the City of

New York, having received the drama from parties or persons who had seen and heard it represented and performed at the Prince of Wales Theatre in London (pages 11 and 12).

On the 8th of April, 1868, the plaintiff commenced this action in the Superior Court of the City of New York, asking for an injunction against the defendant, restraining him from printing and selling this drama, and for an account, and that he deliver up such copies as he had on hand unsold.

He obtained an injunction *ex parte*, which the defendant moved to vacate. That motion was granted. The opinion of Mr. Justice Garvin, vacating the injunction, will be found at fol. 53 of the case.

The case was then tried before Mr. Justice Monell, and a judgment rendered for the defendant. His opinion is at fol. 43.

The plaintiff appealed from that judgment to the General Term of the Superior Court. The appeal was argued in June, 1869, and decided in December, 1870. The opinion of the Court (from which Mr. Justice Jones dissented) will be found on page 26 to 47 of the case.

The General Term reversed the judgment of the Special Term and granted a new trial. From the order and judgment granting a new trial this appeal is taken, the defendant having given the usual stipulation for judgment absolute in case the order and judgment is affirmed.

We propose to present five propositions of law, arising on the facts of this case.

First.—Has the State Court any jurisdiction to protect authors or inventors?

Second.—Has a foreign author any exclusive property in this country to a literary composition composed in another country, and there so far dedicated to the public as to lose his right to protection by the statute laws of his own country?

Third.—Can a foreign author assign *a portion* of his common law right to protection, if he has any, so as to vest it in his assignee, and enable him to maintain an action against

a citizen and resident of this country, who obtained it in the country of the author, from a public and unrestricted representation on the stage by the author himself?

Fourth.—Is not a public and unrestricted representation on the stage in a public theatre, where any one can go who pleases, a publication of the drama and a dedication to the public?

Fifth.—Does an author's rights at common law extend any further than protecting his *manuscript* from being *surreptitiously* appropriated by another, before the author has given it to the public, by printing and circulating it, or by publicly representing it, or in some other way making his work public?

I.

The State Courts have no jurisdiction in actions to protect authors and inventors.

Sec. 8 of the Constitution of the United States provides, amongst other things, that Congress shall have power "to "promote the progress of science and useful arts, by secu- "ring, for *limited times*, to authors and inventors the exclu- "sive rights to their respective writings and discoveries."

The States, therefore, delegated this power *exclusively* to the Federal Government.

The Federal Government having acted upon the power conferred by the Constitution, and provided ample protection to authors and inventors, and courts in which to enforce those rights, the State Courts have no jurisdiction in such cases.

Dudley *vs.* Mayhew, 3 Com., 14.

In other words, the power to protect authors and inventors having been delegated to the Federal Government, and the Federal Government having acted upon that power, and provided the means of protection, and thus debarred the

State Legislature from any right to legislate upon the subject, and from all control over it, can the State Courts, created by the Legislature, establish a copyright at common law which would override the Constitution of the United States? And while Congress only has power, under § 8, to secure to authors and inventors the exclusive right to their works for *limited times*, the States could thus indirectly protect this class of authors for *unlimited times*.

Wheaton *vs.* Peters, 8 Peters, 668.

§ 9, of the Act of 1831, provides fully for protecting unpublished manuscripts, and the courts of the United States are always open for that purpose, and fully empowered to grant injunctions, provided the *author is a citizen or resident*.

§ 8 excludes all persons, not *citizens or residents* of the United States, from the provisions of the Act of 1831 (and this is the reason why the plaintiff is in this court, seeking to obtain what the foreign author cannot obtain in the Federal courts, nor under the laws of the United States.) Authors and inventors are included in the same subdivision of § 8 of the Constitution of the United States.

It was never pretended that the inventor of a machine, after he had allowed it to be seen and used, for profit to himself and thus made public, could come into a State court for protection. On the contrary, it has been held that he could not.

In Dudley *vs.* Mayhew, 3 Com., 1, the Court say: "At "common law, and independent of the Act of Congress, "authors and inventors acquire no exclusive right to the "benefit of their writings and discoveries."

See Wheaton *vs.* Peters, 8 Peters, 660, 661.

The Act of Congress expressly confers jurisdiction on the Federal courts to protect authors and inventors.

U. S. Statutes at Large, vol. 5, page 124, § 17.

Unless some distinction can be drawn between *authors* and *inventors*, we see no reason why a different rule should

apply to one, than to the other. If there is a difference it should be in favor of the inventor.

Per Lord Brougham, Jeffreys *vs.* Boosey, 4 H. L. Cases, page 966.

Per Lord Chief Justice Jervis, id., page 945.

The genius and perseverance of a Fulton, who, from the rough ore of the mountain, struggling with poverty and public scepticism, could construct a machine that has revolutionized the commerce of the world, would be entitled to protection at common law before a literary scribbler, who has construed from the world of letters a silly comedy that pleases for a day, and is then forgotten forever.

The unremitting application of Howe; the years of deep study and earnest toil, amid privations and cares that would have made the stoutest heart quail while perfecting a machine which is now the companion of every household, deserves protection at common law far more than the poacher who wades through the literary sewers of France, appropriates what he chooses, puts his own gaudy dress on it, calls it his own, and then foists it on the American public as the wonderful emanation of his brilliant genius.

Which requires the deeper and most profound study? Which deserves most to be called the work of the "human mind?" Why is the property in one to be protected in a different, more lasting and effectual way than the other, when the law has provided ample protection for both under the statute? Why is one sought to be forever protected under the broad wing of the common law, while the other is *concededly* protected only fourteen years under the statute? Why are the State courts open to one, and closed to the other? Why do the State courts protect the literary scribbler and leave the profound and struggling inventive genius to his protection under the statute?

If this is the common law, as contended for by the plaintiff, it falls a little short of the boasted "perfection of human reason" which it is presumed to be.

I am aware that in the case of Woolsy *vs.* Judd, 4 Duer, 382, Mr. Justice Duer, on an application to restrain the pub-

lication of *private letters*, touches upon this subject, and holds that the jurisdiction was vested in the State court to protect private letters before the Act of Congress was passed, and therefore it subsists unimpaired. This may be strictly correct, as private letters could hardly be considered literary property, and it is doubtful if they were within the intent of the Act of Congress. I am not aware of a case in this country where the common law courts entertained such a jurisdiction, to protect author's literary property prior to the Act of Congress, and I believe there are none. It is an open question in this State, so far as this court is concerned.

See Wheaton *vs.* Peters, 658.

II.

A foreign author, not a citizen or resident of this country, has no right at common law nor by statute to restrain the publication of a literary composition composed and written by him in England, and there, by his sanction and authority publicly represented on the stage; and, by such representation, so far dedicated to public use as to lose his right to a copyright by the statute laws of his own country.

Jeffreys *vs.* Boosey, 4 H. L. Cases, 978.
Per Lord Brougham, page 964.
Per Baron Pollock, page 937.

The only right the plaintiff claims is the right to *print, publish* and *represent* the drama in the *United States* (fol. 31). This was all that was assigned to him on the 1st of February. Robertson, therefore, had a right to *print*, publish and *represent* it in England. On the 15th of February he did represent it at the Prince of Wales Theatre, in London (fol. 33).

The 5 and 6 of Vic., ch. 45, sec. 20, provides "that the "first representation of a dramatic piece shall be deemed

"equivalent, in the construction of that act, to the first "publication of a book."

After Robertson's representation of this drama in London what was his situation there? He could not get a copyright, because he had published his play by representing it on the stage. Had not every Englishman in London, after such representation, a right to publish the drama in a newspaper, if he chose to do so? Had he not, by representing it, forfeited his right to protection under the laws of his own country?

Jeffreys *vs.* Boosey, pages above cited.

The defendants obtained it from persons in England, who obtained it from such public representations (fol. 35).

If such persons had a right to take it in England, surely the defendant had. Had Robertson even obtained a copyright of his play, and then printed and circulated it, any American publisher could have re-printed it here, and the author would have been without protection.

It is not disputed that the published works of an alien author, whether copyrighted or not in his own country, are without protection here.

This point was taken in the case of Crowe *vs.* Aiken, 4 American Law Review, 457, before Judge Drummond, and is disposed of on the ground that it "seems never before to "have been taken by the counsel or the Court, and that "this statute is not operative in this country." All we claimed was that it was operative *on the author* of the play, it being a statute of his *own* country. If his rights were lost there, they were gone everywhere. If a person there had a right to take it, a person here had the same right.

If he was without protection in his own country, he was without protection here. This is what we claimed before Judge Drummond, and what we claim here.

Mr. Curtis says: "The actual law of nations knows no exclusive right of an author to the proceeds of his work, except that which is enforced by the municipal law of his own country, which can operate nowhere except in its own jurisdiction."

Curtis on Copyright, 22.

Where then is the right of a resident and citizen of another country to come into the courts of common law in this State, and ask a court of equity to give him such relief as the Legislature of this State has no power to give him, and which the Federal Government has, in express terms, denied him, by refusing to give him the benefit of the copyright law?

Curtis on Copyright, 148.

The elasticity of the common law enables the judges who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live—thus avoiding the injustice which arises when the law is no longer in harmony with the wants and usages of the present. Upon what principle of equity or justice is an American publisher to be restrained from printing and selling, for the benefit of American readers, a play which the author represents on the stage in England time after time, when that author is in express terms excluded from all protection under the legislation in this country, and by the very legislative body to which this State has delegated the exclusive power to protect authors for "limited times?"

A foreign author is denied even the right of protecting his manuscript from publication, yet the Legislature thought this necessary to protect American authors. Had they considered the common law right unimpaired, there could be no necessity for this act to protect unpublished manuscripts.

U. S. Laws of 1831, § 9.

It cannot be denied that Congress had full power to legislate upon this subject, and to say that a citizen of the United States shall have the right to publish any work of a foreign author.

Sec. 8 of the Act of 1831 reads as follows: "That nothing in this Act shall be construed to extend to prohibit the importation or vending, printing or publishing of any map, chart, book, musical composition, print or engraving, written, composed or made by any person not being a citizen of the United States, nor resident within the jurisdiction thereof."

Does not this statute, by necessary implication, give every citizen of the United States a right to import and publish the works of any foreign author, not a resident of the United States?

People *vs.* Draper, 15 N. Y., 558.

If this is not the meaning of this section of the statute, what does it mean? We claim that this expressly authorizes every citizen of the United States to import and print the works of a foreign author, whether it has been printed abroad or not.

The defendant has done nothing but import a work composed and written by a foreign author, not a resident within, nor a citizen of the United States.

Does not the whole spirit of the statute, strip foreign authors of all protection for their works, written abroad?

The Court will find all the earlier cases cited by the respondent referred to and commented on, and many of them disapproved, in the case of Jeffreys *vs.* Boosey, 4 House of Lords Cases.

III.

A foreign author cannot assign a portion of his common law right, if one exists, so as to vest it in his assignee, and enable him to maintain an action against a citizen of this country, who obtained the composition in the country of the author from a public and unrestricted representation of the work on the stage by the author himself. Can the author divide his right into ten thousand parts, and give to ten thousand different men the "exclsive right and privilege of *printing and publishing*, enacting, performing, "representing and producing on the stage in the United "States, &c." (fol. 82), as he has in this case? We answer no.

Per Lord St. Leonards, 4 H. L. Cases, 993.

He cannot give his assignee the right to *print* at all; because, concededly, the moment he prints it, or his assignee prints it in this country, every person has a right to go and do likewise.

If he could not give him an exclusive right to *print it*, can he confer upon his assignee a right to prevent any other person from *printing* it? He cannot confer upon his assignee a right he has not, and can never acquire himself.

4 H. L. Cases, page 992.

Neither the foreign author nor his assignee has, nor can they in any way obtain the exclusive right to *print* this composition in this country. What is the ground, then, upon which either of them can restrain this defendant from *printing* it?

He violates no right which they have, or which in any way belongs to either of them.

He proceeds upon the theory that the foreign author has the exclusive right in the United States to *print* his composition.

At the same time he is compelled to concede that the moment he has printed it his right has gone forever. A right which vanishes the instant its exercise is attempted, is no right at all.

IV.

A public and unrestricted representation on the stage, in a public theatre, where any one can go who pleases, is a publication, and a dedication to public use.

The law presumes something from a man's actions; and it is a fair legal presumption that an author intends to abandon his exclusive proprietary rights when he communicates publicly to all the world his composition, without restriction.

4 H. L. Cases, pages 964, 937.
2 Blackstone Com., 405.

The play was written to be publicly represented and communicated to every man, woman and child on the face of the earth who would go and hear it. Therefore, representation cannot be said to be any exclusive use of it.

Lord Brougham, in Jeffreys *vs.* Boosey, 963, says: "If, "instead of orally delivering his composition to a select "number, he delivered it to all who came and heard him, "imposing no restriction, he could not complain with effect "of any one repeating it to others who had not been present."

And again, at page 965, he says: "When the period is "demanded at which the *property vests*, we are generally referred to the moment of publication; but that is the moment when the hold of the proprietor ceases. He has produced the thought and given it utterance, and *eo instanti* it "escapes his grasp."

Keene *vs.* Clark, 5 Robertson, 59, Mr. Justice Robertson says: "But where such communications are indefinitely "multiplied, so as to embrace an innumerable host of "hearers, there would not seem to be a great difference in "principle, between giving the composition to the public at "once or by degrees."

He also holds that the intent to make public is inferable from frequent and continued public representations.

Mr. Justice Garvin, in his able and learned opinion, which will be found from page 20 to 26 of this case, holds that public representation of this drama on the stage, without restriction, before any persons who choose to attend, is a publication of it that deprives the author of any exclusive right in his work. He further holds that there is no valuable and exclusive right in the works of a foreign author which our courts can protect.

Mr. Justice Cadwallader, in the case of Keene *vs.* Wheatly, 9 American Law Register, says: "The literary proprietor "of an unprinted play cannot, after making or *sanctioning* its "representation before an indiscriminate audience, maintain "an objection to any such literary or dramatic representa"tion by others as they may be enabled, either directly or "secondarily, to make, from its having been retained in the

"memory of the audience. * * * When the audience "is not a select one these privileges cannot be restrained in "their immediate or *ulterior consequences*."

The case of Boucicault *agst.* Delafield, 33 Law Jour. N. S., ch. 38, which Mr. Justice Monell refers to at fol. 129, has been entirely misapprehended by him. This case arose under 7 Vict., ch. 12, sec. 19, which is as follows, viz.:

"And be it enacted, that neither the author of any book, "nor the author or composer of any dramatic piece or musi- "cal composition, nor the inventor, designer or engraver of "any print, nor the maker of any article of sculpture, or of "such other work of art as aforesaid, which shall, after the "passage of this Act, be first *published* out of Her Majesty's "dominions, shall have any copyright therein respectively, "or any exclusive right to the public representation or per- "formance thereof, otherwise than such as he may be entitled "to under this Act."

Chitty's Statutes, vol. 1, page 924.

Mr. Justice Monell refers to the 5th and 6th of Vic., ch. 45, sec. 20, as interpreting or defining the word "publication" in this Act, whereas it has nothing to do with a foreign publication at all. It was passed long before the 7th of Vic., and referred wholly to representation in England. An examination of the case of Boucicault *vs.* Delafield would have readily disclosed this fact.

The case, therefore, presented the simple question, and that alone, whether the *representation* of "The 'Colleen Bawn' in New York was a *publication* of it?" Not publication as *defined* by any statute, but in its ordinary sense.

Vice-Chancellor Sir W. Page Wood said: "If any author "chose to deprive this country of the benefit of the first "publication of his work, and published it in a country "which had not the benefit of an international treaty, then "this country had nothing more to do with him. Mr. "Boucicault, by first *publishing* his play in New York, "rather than London, must be taken to have elected, and "he is thereby excluded from all advantages of publishing "in this country."

The case of Coleman *vs.* Watham, relied on by the respondent, was relied on by counsel in that case.

Boucicault was a British subject, and the only publication was representation on the stage in New York.

Mr. Justice Monell's mistake arose, no doubt, from the fact that the points for the appellant in the court below, prepared and handed in after the argument, contain an assertion that "one of the sections of the statute under which "the action of Boucicault *vs.* Delafield was brought provides, "save and except that the first public representation or per- "formance of any dramatic piece or musical composition "shall be deemed equivalent, *in the construction of this act*, "to the first publication of any work."

In this the counsel was mistaken. There is no such section in the 7th of Victoria, and no statutory interpretation or definition of the word "publication" given at all in the Act. The learned Justice, by adopting the statement, apparently without examination of either the case or the statute, fell into the same error, and holds, at fol. 131, that this case is no authority. This case is a direct authority, applied by an English Court to an Englishman, that a public representation on the stage is a *publication*, within the ordinary meaning of the word. The word "publication," in the 7th of Vict., means exactly what it does in the 8th of Peters, and exactly what it does in the works of all the standard English authors. The word "*publication*" means "the act of "publishing, or making public; divulgation; promulga- "tion; proclamation; offering to the public; the formal "declaration made by the testator at the time of signing his "will."

Wooster's Dictionary, 1,151.
Webster's Dictionary, see "Publish."
Tomlin's Law Dictionary, vol. 3, 256.

The translators of our Bible are standard authorities for the true meaning of English words, and they have employed the word "publish" in its correct interpretation when they wrote: "Tell it not in Gath, *publish* it not in the streets of Askleon." Yet Askelon boasted neither printing press nor public theatre.

The standard authors on the English language have defined the word as follows:

Publication.—A making public; to make public; spread abroad.—Dictionarum Brittanicum. By N. Bailey, Professor of Modern Languages. London: T. Cox. MDCCXXXVI.

Publication.—Open discoverie; making of things common.—A French-English Dictionary. By Randle Cotgrave. Printed for W. H. by Octavius Pulliyn, in 1611.

Publication (Publico—Latin).—The art of publishing, of notifying to the world; divulgation; proclamation.

To Publish (Publier—French; Publico—Latin).—To discover to mankind; to make generally and openly known; to proclaim, to divulge.

"How will this grieve you. . . . . that you thus have *published* me?"—SHAKSPEARE.

"Suppose he should relent,
And *publish* grace to all."—MILTON.

"Does his creator's power display,
And *publish* to every land
The works of an Almighty hand?"
—ADDISON'S SPECTATOR.

Publication (Latin—publicatio).—The art of publishing, or offering to the public notice; notification to a people at large, either by *words*, writing or printing.

Publish, to (Latin—Publico).—To discover or make known to mankind, or to people in general, what before was private or unknown; to *utter*; to put off or into circulation; to make known by post, or by *reading* in a church.—Imperial Lexicon of the English Language, by the Rev. John Boag. Vol. II, p. 287. Fullerton & Co., Edinburgh, 1853.

Publish.—To make known to mankind, or people in general, what before was private or unknown; to make known by posting, or by reading in a church, as to publish banns of matrimony.—Universal Pronouncing Dictionary of the English Language. Thos. Wright, M. A., F. S. A., etc. London Printing and Publishing Co., London and New York. Vol. 4, p. 911. Rev. James Barclay's Universal English Dictionary, revised by Rev. B. Woodward. 1848. General Dictionary of the English Language, by Thos. Sheridan, A. M. London, 1753.

This word "publico" was in use in Rome centuries before printing was invented. Its meaning was well understood. It meant then just what it means now.

The court below went upon the theory that publication meant printing, and that there could be no publication except in print. Where is their authority for that? Mr. Justice Garvin's view (fol. 67) was the direct opposite of this.

If we are without direct judicial authority on this question it seems to us the Court should be guided by the authority of distinguished lexicographers, and should hold this to be a publication. We might as well say, when a man is sued for publishing a slander, that he must print it before he could sustain the action, as to say that the repeated and unrestricted repetition of a thing before the world at large is not *publishing* it. No case ought to be disposed of in a court of equity on any such artificial distinction, where there is not the slightest necessity for it.

Is not the sound, practical, common sense view, that adopted by Judge Garvin in this case: that *unrestricted* communication to the world is a publication? When it is publicly represented, to use the language of the findings, "*by and with the sanction of the author*," is that not an abandonment of it?

Will the Court create an artificial rule, and hold that "publication" means something different when applied to an author, than when applied to the common affairs of life?

We say, therefore, if this court follows out the weight of authority in this country, the course of legislation, the generally understood meaning of the word "publication," by all standard authors, the sound practical common sense of the case, they must hold that representation on the stage is not only a publication, but (printing excepted) the most general and effectual publication any work is susceptible of. Printing *alone* is not a publication.

Prince Albert *vs.* Strange, 1 McN. & G., 25.
Sweet *vs.* Archbold, 10 Bing., 133.

For there the copyright was taken after the book had been printed.

If an author prints his work and keeps it to himself, it could not be pretended that he had published it.

The appellant cites the case of Coleman *vs.* Wather, 5 Term. R., 245, to show that a representation is not a publication. As this case is a fair specimen of the cases cited as authority for the respondent's position, we refer to it particularly.

This action was brought for the penalty under the statute 8 Anne, ch. 19, for publishing the "Agreeable Surprise." The plaintiff had purchased the *copyright* (this play was copyrighted) from O'Keefe, the author, and the only evidence of publication by the defendant was the representation of this piece upon the stage at Richmond. A verdict was given for nominal damages for plaintiff, in order to raise the question whether *this mode of publication* (the Court conceding that it was a *publication*) was within the *statute*.

Lord Kenyon, *C. J.* There is no evidence to support the action in this case. The statute for the protection of copyright only extends to *prohibit the publication of the book itself* by any other than the author, and that representing the play was not within *the statute*.

See the Language of the 8th Anne.
Curtis on Copyright, page 333.

This, then, is no authority against us, and if it was we submit that the common law is flexible enough to retire from a position so absurd as holding that the most extensive means of circulating and giving to the public a literary work (printing excepted) is not *publishing it*. I think, on a critical examination of this class of cases, they will be found to turn upon the construction of the copyright act.

This work was written to be published in this way. It was intended that every person on earth should have access to its rehearsal. It was given to the public without restriction by the author himself. The actors who played it at the Prince of Wales Theatre, of course, committed it to memory with the author's sanction, and yet it is contended this is not a publication, nor a dedication to public use. If this is not evidence of dedication to public use; if this is not the strongest evidence of abandonment of the work; indeed, if any other or better evidence of its dedication and abandonment to the public use could be suggested, I should be glad to hear it.

The findings (fol. 32) find that on the 1st of February the author delivered the *manuscript* to the plaintiff.

On the 15th of February they find that the author represented it at the Prince of Wales Theatre in London.

That on the 26th of March the defendant received the play from persons who saw and heard the same publicly performed in England.

If the defendant obtained the play in England on the 15th February, when the *manuscript* was in this country in the hands of the plaintiff on the 1st of February, it is idle to talk about the defendant having *surreptitiously* obtained the *manuscript*. "Surreptitiously" means by stealth, fraudulently, without authority. We obtained it from a representation which the author had a perfect right to make; it was legal and lawful and not *surreptitious*, because he reserved his rights in England, only assigning to the plaintiff his right for the United States.

The author had a perfect right to print it and sell it in England. If he had done so, and the defendant had reprinted it here from one of those copies, could this plaintiff restrain him. He will not claim this, but he asks the Court to say that we came wrongfully by this play, when the facts as found show that we picked up and made use of what the rightful owner in England threw away to the public; that what the rightful owner in England choose to give us we have not a right to use here.

The Court will not presume a man to be a thief when the facts are equally consistent with innocence.

Colman *vs.* Wather, 5 T. R, 254.
Keene *vs.* Clark, 5 Robertson, 38.

In nearly all the cases referred to, the courts have decided, that when a play was publicly represented on the stage, and the auditor was able to write out the play from *memory* afterwards, the author was without protection.

In other words, these cases make the rights of the author depend, not on his own *act* in giving the play to the world, but upon the strength of memory which the Almighty has bestowed upon different persons in the audience. Hence, if A and B sit side by side in a theatre and listen to a play, and A is able to go home and write it out from *memory*, the author cannot restrain him from making such use of it as he sees fit; whereas B, whose natural endowments are

less, so that he uses stenographic characters to aid his sluggish intellect, can be restrained.

I have never yet been able to comprehend this reasoning, or see the distinction thus made. The rights of an author should be made to depend on *his own acts*, and not upon the gifts the Almighty has seen fit to bestow upon the human race. Hence we say, when an author publicly or without any restriction or reservation rehearses his composition, or causes it to be committed to memory and rehearsed before the whole world, if they choose to go and hear it, this should be the *reason* why he loses his rights and not the strength or weakness of human memory.

We cannot feel our way along down through the dim light of a century by a balustrade of old, ill defined cases, decided before stenography was known, and undertake to apply the reasons that guided men then to the living present; we are apt to measure their depth by their darkness, and fancy they are profound because we feel that we are perplexed. The common law must keep pace with the march of science and civilization, or it sinks into many grave absurdities. To go back to decisions made a century ago, when the drama had scarcely emerged from its re-birth after Puritanical prosecution, when the dramatic art was not a regular profession, and players vagabonds according to act of Parliament, in order to decide contested points now-a-days, is as absurd as to quote the usage of travel, anterior to the invention of steamboats and of locomotives, as applicable to our present common carriers. The world moves, as does the age we live in, hence a resort to the profoundities of obsolete jurisprudence may demonstrate praiseworthy erudition, but no very competent knowledge of now existing events.

VI.

The Court will find very little, if anything, that can be considered authority on any of these questions. All the

old English cases cited by the plaintiff will be found in Phillips on Copyright, in their order, fully commented on, showing which are overruled and which are affirmed down to 1863; also, all the English statutes on the subject; hence I have referred to few of them in detail.

The doctrine sought to be established by the respondents in this case make every foreign dramatic author a creator of *perpetual copyrights*, which are without limit of duration. It establishes a species of literary property of doubtful propriety, and a copyright law that overrides the statutes of the United States and gives to every Englishman rights which are denied to American authors in England.

These same aliens, who would deny a native born American, did he possess the literary genius of Shakspeare, of Wycherley and of Congreve combined, the meanest opportunity for submitting a masterpiece of skill in competition to their associated interests, upon the boards of an English theatre, have, of late, not only claimed the right to compete with American authors, in direct violation of a copyright law, which they were mainly instrumental in having passed some years back, but now, through vexatious litigations, seek to secure, indirectly for themselves, protective advantages, which would, if accorded to them, effectually preclude the remotest possibility of an American National Drama creeping into existence.

It is, certainly, a pitiable spectacle exhibited to the world of letters, that this Great Republic cannot boast of a solitary American dramatist, at the moment living, whose compositions are acknowledged as belonging to the standard acting drama. While we can point with pride to the elaborate productions of Americans in the highest grade of literature, and challenge contemporaneous scholarship to excel in talent or erudition, Motley, Bryant, Wheaton, Longfellow, Emerson and others, who have conferred honor upon our national name, at home and abroad, our laurels in the dramatic world are confessed to have withered upon the brow of the unfortunate John Howard Payne—for, with the author of "Brutus," of "Charles the Second" and "Therese," perished the last of our line of practical dramatists. And what

chance is there that an imitator of this one man can be tempted to arise, when our most popular theatres vie with each other in an indecorous scramble to secure the filterings of the London stage, and drivellings from such brains as those of T. W. Robertson, Tom Taylor, Boucicault, and such like dramatic mechanics, whom the degeneracy of the modern stage has suffered to be regarded as worthy successors to Sheridan, Coleman, Cumberland, or even Jerrold?

It is readily to be seen that this recently mooted idea of conserving popular pieces in manuscript originated in a desire to evade copyright requirements; for a piece that will not stand the critical scrutiny of the general public, cannot be regarded as an acquisition to our national literature. Should otherwise such be the case, it degenerates into a fault to sanction even the possibility of losing a literary treasure of a comparatively valuable nature. Consequently, to encourage by any legal action the limitation in number of copies of works of any description is an error of judgment, as the influence of the Government and the courts of common law should always be exerted for the diffusion of knowledge instead of its contraction; and dramatic compositions, from the days of miracle plays to the era of our own times, have been regarded as among the most instructive and agreeable means of circulating information among the masses.

Future American dramatists are here asking protection—asking that the British Dramatic Authors' Society shall not have a perpetual monopoly of copyright for their literary hash in this country; asking why Scott and Dickens, Macaulay and Read, and a host of men of real worth, are at the mercy of every American publisher, while these plays are protected, simply because one publishes in *print* and the other, quite as effectually, by *repeated repetitions*. *Both* for gain and profit. The same influence which seeks to establish this doctrine in our courts of common law, sought, in 1870, to accomplish the same thing through Congressional legislation. We refer the Court to the report of Senator Morrill, accompanying Bill S, No. 703, recommending its rejection.

The arguments there advanced why the "legal pro-

prietor" of a foreign dramatic author should not be protected in this country are unanswerable.

VII.

We ask that this judgment be reversed, and the judgment of the Special Term affirmed, with costs.

IRA D. WARREN,
Counsel for Defendant.

LARNED & WARREN,
Defendant's Attorneys.

In the Court of Appeals.

HENRY D. PALMER,

Plaintiff and Respondent,

against

ROBERT M. DE WITT,

Defendant and Appellant.

Plaintiff's Points, in Support of the Right of Literary Property.

WILLIAM D. BOOTH,

of Counsel for Plaintiff.

62 Wall Street, New York.

NEW YORK:
TOBITT & BUNCE, LAW PRINTERS, 90 FULTON STREET.
1872.

TOBITT & BUNCE, Law Printers and Stationers, 90 Fulton-St. N. Y.

In the Court of Appeals,

ON APPEAL FROM THE N. Y. SUPERIOR COURT.

HENRY D. PALMER,
Plaintiff and Respondent,

against

ROBERT M. DE WITT,
Defendant and Appellant.

} Points for Respondent.

STATEMENT.

This action was brought to restrain the defendant from the unauthorized printing of an uncopyrighted and unpublished manuscript drama. An injunction was issued on the 8th of April, 1868, which was dissolved, on motion, December , 1868, (fols. 53, 75).

The cause came on to be heard before Mr. Justice MONELL, at special term, on the 27th day of April, 1869; and the court, considering the decision of the motion at special term, dissolving the injunction, as *res adjudicata*, rendered a judgment dismissing the complaint (fol. 36).

An appeal was taken to the general term, and a decision rendered December 12th, 1870, reversing the judgment below, upon the merits, and granting a new trial.

The opinion of the general term is found at fol. 76 of the case.

From the judgment entered thereon, the defendant appealed to this court, stipulating that if the order appealed from should be affirmed, judgment absolute should be rendered against him (fol. 49).

The plaintiff claims to be the literary proprietor of an unpublished manuscript, which he had acquired by direct assignment from the author, and which vested in him the sole right for the United States, of a certain drama called "Play," and insists that the judgment appealed from, was correct.

The drama was an unpublished manuscript work, adapted to scenic representation on the stage, and the exclusive use of which, for that purpose, was of great value. The defendant, without the consent of the plaintiff, has printed many copies of the manuscript, and sold them extensively throughout the country, and still continues such printing and sale, by means of which wrongful acts, the exclusive use of the drama has been lost to the plaintiff, and its value to him, as a piece of literary property, has been greatly impaired, and in point of fact, almost wholly destroyed.

The facts in the case, as found by the court (fol. 31), are briefly as follows :

FACTS.

Prior to February 1, 1868, T. W. Robertson, a resident of London, was the sole author of the drama in question, entitled "Play." On said day, said Robertson, for a valuable consideration, by an instrument in writing, duly assigned and transferred to the plaintiff the exclusive right and privilege of *printing*, publishing, acting and performing, and of licensing, and permitting to be printed, published, acted and performed, throughout the United States, the said drama, together with all his rights and privileges therein, and thereto, as the author thereof, throughout the United States, and all the benefits to be derived therefrom.

Prior to February 15, 1868, the comedy had not been printed, published, or performed. On the 15th of February, 1868, for the first time, and for a great number of times thereafter, the comedy was publicly performed at the Prince of Wales' Theater, in the city of London, by the sanction of the author, in the presence of large audiences; and there was no restrictive notice given the spectators against carrying away the comedy by memory, or otherwise, or using and printing the same. The defendant received the words of the comedy, and a general description of the arrangement, stage directions, divisions of acts and scenes, as printed by him, from one

or more persons who had witnessed such performance in England.

On the 25th of March, the defendant, against the will and without the knowledge of the plaintiff, printed and sold certain printed copies of the drama, which were *identical in all respects* with the plaintiff's copy, and still continues such printing and sale; and that by reason of defendant's acts, the plaintiff has sustained damages incapable of computation, in not having the exclusive sale of the comedy.

Point I.

There is no question of copyright involved in this case. The drama has never been copyrighted, either in England or the United States. No such defense is set up, and *no such fact is found.* The right which the plaintiff here seeks to enforce and for the vindication of which he invokes the aid of the court, is the Common Law right which every author and his legal representatives have in manuscript literary productions *before* and *until* publication. This right is wholly distinct from the so-called copyright, or the right conferred by statute, to the duplication of copies *after* publication. It is the right anterior to, and independent of the statute; and which, in the forcible language of Judge DUER (4 *Duer*, 489), still remains "*absolute and exclusive*, and so long as the manuscript may exist unpublished, and its author or his representatives may choose, it is *perpetual.*"

1. Not being a right claimed under the statute of the United States, relating to copyright, the plaintiff is not limited to the federal courts for redress; and no question of jurisdiction arises. The common law protects his rights; and section 9 of the act of 1831 (amended July 8, 1870), also opens to him the federal courts, irrespective of citizenship (Bartlett *v.* Crittenden, 5 *McLean*, 38; Woolsey *v.* Judd, 4 *Duer*, 489; *Com. Dig. Action on Statute*, 6).

2. The case is distinguishable in principle from the rule laid down in Dudley *v.* Mayhew (3 *N. Y.* 9), where an inventor sought to restrain the infringement of his patent in the State courts, because the right of an inventor to his invention is wholly granted by statute, and his remedy is to be sought only in the tribunal designated by the statute. In the language of Mr. Webster, copyrights and patents differ widely. "The one is property; the other legalized monopoly. The one is a natural right; the other, in some measure, against natural right. Patents are simply favored monopolies." It never was contended that by the common law an inventor had a property in the subject of his invention. While, on the other hand, the right of an author to his work has been held to be absolute and exclusive, through a series of decisions from 1732 (Webb *v.* Rose, the subject of piracy being cases *Tempus Talbot*) until in 1774, the House of Lords, in Donaldson *v.* Becket (4 *Burr.*, 2408) decided that the statute of Anne had taken away the common law right of the author *after* publication, and that the multiplication of copies thereafter could only be secured to him by statute—*leaving untouched the right of the author before pubication.* To the same effect is the decision of the United States Supreme Court in Wheaton *v.* Peters (8 *Pet.*,) that the right after publication, existed

only by virtue of the statutes of Congress, which, having limited the common law right *to*, or cut off the common law right *at* the instant of publication, may be said to have created the right thereafter.

In the case now before the court on this appeal there has been neither copyright nor publication.

Point II.

Literary property—by which is meant the right of an author to the exclusive use and enjoyment of the productions of his mental faculties, when embodied by him in a connection of words and sentences—the thoughts, ideas, and sentiments of the brain, when expressed in a consecutive arrangement of words,—has been held unquestioned. Until some intentional or unequivocal act of his shall have vested in another some adverse right, the author's property in his work remains perpetual. Mr. Justice McLean, in Wheaton *v.* Peters (cited above), says "that an author, at commen law, has a property in his manuscript, and may obtain redress against one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit from its publication, cannot be doubted." To the same effect is the able judgment in the House of Lords, in the case of Jeffreys *v.* Boosey, concurred in by Crompton, Williams, Wightman, Maule, Coleridge, Alderson and Park. In the language of Lord Brougham, in that case, "the right of an author before publication, we may take to be unquestioned; and we may even

assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript. He may withhold, or communicate it; and communicating it, he may limit the number of persons to whom it is imparted, and may impose such restrictions as he pleases, upon their use of it. The fulfilling of these conditions he may proceed to enforce, and for their breach, he may have compensation." Lord St. Leonards says, in the same case: "The common law does give to a man who has composed a work a right to that composition,—just as he has a right to any other part of his personal property." Mr. Justice Earle, also, in the same case, most forcibly says: "If the author chooses to impart his manuscript to others without general publication, he has all the rights for disposing of it, incidental to personalty. He may make an assignment, either absolute, or qualified in any degree. He may lend, or let, or give, or sell, any copy of his composition, with or without the liberty to transcribe,—and if with liberty of transcribing, he may fix the number of manuscripts which he permits. If he prints for private circulation only, he has still the same rights; and all those rights he may pass to his assignee. *About the rights of an author, before publication, at the common law, all are agreed.*" The Lord Chancellor, in the case of Prince Albert *v.* Strange (2 *De Gex & Sm.* 692), says: "The property of an author, or composer of any works, whether of literature, art or science, in such

works unpublished, and kept for his private use or pleasure, cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed."

It is needless to add authorities upon this point, before this court.

This property is ideal in its character, and as such is the especial favorite of the law. Those who by mental labor work for the advancement of the morals of the times, the improvement of manners, the instruction of mankind, the elevation of humanity, or the enlightenment of amusement or the world, are ideal workers ; and to encourage and protect these workers, every court should favorably construe the law,—and not only should, but does. To ideal property, and to that alone, does the law extend the measure of vindictive damages. The actions of libel and slander are for the vindication of the most ideal of all property,—personal reputation. The pleasure of a husband in the society of his wife, the good will of a business, the use of a trade-mark, all are purely ideal in character ; and injuries to these are redressed by vindictive damages.

1. This right of an author is property in the law. It possesses all the attributes and incidents of property, passing by gift, deed, devise, and the law of descent. The following cases sustain this proposition.

In Morris *v.* Kelley (1 *Jacobs & Walker*, 461), the assignee of an assignee was protected against

an unauthorized performance of a drama thirty-five years after its composition, and after many public performances by its proprietors.

In Webb *v.* Rose (3 *Swanst.*, 694), an injunction was granted to an executor

In Tonson *v.* Walker (3 *Swanst.*, 672), an assignee was protected.

In Motte *v.* Faulkner an assignee was protected.

In Barnett *v.* Chetwood (2 *Merivale*, 441), an executor obtained an injunction to restrain the translation even, of a Latin manuscript.

In Thompson *v.* Stanhope (*Ambler*, 737), the executor of Lord Chesterfield obtained an injunction against his son's executor.

In the Duke of Queensbury *v.* Shebbeare (2 *Eden*, 329), the administrator of an heir obtained an injunction against the administrator of a person to whom a manuscript copy of Lord CLARENDEN's History had been *given* by the author; and this was after the lapse of nearly a hundred years, and when the original copy had itself been lost.

2. This right of property in the author is capable not only of being transferred by assignment, but even of partial or limited assignment. And we lay it down as *an elementary maxim in law, that all property which in its nature is capable of being divided, is capable of having each of its parts separately possessed in law.* A dramatic composition peculiarly illustrates this. The right of printing may be held by one, the right of performance may be held exclusively by another—that is, it may be enjoyed by one man—or it may be subdivided; and held by several for separate localities—either States, cities, or theatres. The author may assign wholly, as we have seen, or to a limited territory, or for a limited time; and his assignee has a remedy in equity for the unauthorized use by others in such territory, or within such time.

As in Roberts *v.* Meyers (23 *Mo. Law Rep.*, 396), where the plaintiff was the assignee for certain cities only.

As in Jones *v.* Thomas (1 *N. Y. Legal Obs.*, 408), where title was held for a single theatre only.

As in Keene *v.* Wheatly (9 *Am. Law Reg.*, 33), where the plaintiff was the assignee for the United States and Canadas only, of the work of a foreign author who had retained his property in England in the work.

As in Crow *v.* Aiken (4 *Am. Law Review*, 450), where the plaintiff was the assignee for the United States only, and for the period of five years only, of a drama which was the work of a foreign author.

3. It was thought at one time, from the remarks of Sir THOMAS PLUMER in Percival *v.* Phipps (2 *Ves. & B.*, 91) that the subject matter must be of value as literature; and some early cases in this country seem to have followed that rule. But this doctrine was wholly exploded in England by the case of Gee *v.* Pritchard (2 *Swanst.*, 402), and in this State the lucid and elaborate opinion of Judge DUER in Woolsey *v.* Judd (4 *Duer*, 389), is to the same effect; as is also the reasoning of the supreme court of the United States in Little *v.* Hall (18 *How. U. S.*, 170).

4. Nothing possesses the incidents of property to a greater degree than a manuscript work. Nothing can be called more peculiarly a man's own. No one is more fully a proprietor of anything than an author of his works; and to his right to full protection, at all times, against all infringers, there are but two limitations: 1. The immorality of his work, where the law refuses protection on the ground of public policy, as in Southey *v.* Sherwood (2 *Mer.*, 334); Stockdale *v.*

Onwyn (2 *Car. & P.*, 163); and, 2. Publication, or an abandonment of his rights to the public.

Point III.

We now propose to consider the question of publication. Publication is a dedication to the public; a printed collocation of words, is essential to it. It implies, *ex vi termini*, that there has been on the part of the author, a voluntary dedication or abandonment to the public of that which was before his sole and exclusive property and right; that by it he not only does not intend to maintain or retain his rights, but voluntarily abandons them.

1. Printing, *alone*, is not publication (Prince Albert *v.* Strange, 2 *De Gex & Sm.*, 689; affirmed, 1 *McN. & G.*, 25; Sweet *v.* Archibald, 10 *Bing.*, 133).

2. Proof of publication is, that the printed book was publicly offered for sale in a shop, and could be bought at a given price, by any one. Other unequivocal acts showing intent, would be evidence, but the above is proof (Baker *v.* Taylor, 2 *Blatchf.*, 82).

3. The intent of the author or owner is to be considered in determining if the acts done amount to a publication; and where no unequivocal intent is shown, no publication ensues. Consequently, it was held, in the case of Abernethy *v.* Hutchinson (*ubi supra*), that no intent of parting with the right of proprietorship could be inferred from the public delivery of lectures to a class of students; and, in the case of Bartlett *v.* Crittenden (4 *McLean*, 300), from the general cir-

culation of forms of instruction among a large class of students; and in White *v.* Gerock (1 *Chitty*, 24), from the circulation and sale of hundreds of manuscript copies of a musical score, among the members of a musical association; and in Paley's case (cited 2 *Vesey & Beames*), from the circulation of manuscript copies of sermons, throughout a large parish.

Point IV.

The public dramatic performance of a manuscript drama on the stage, by the author or his assignee, for his or their own profit, *is not a publication.* It is a use of property by its owner—not an abandonment of right. If it be property, the right to use it must exist. As was well said by Mr. Justice Aston, in Miller *v.* Taylor (4 *Burr.*, 2408), "Property, without the right to use it, is but an empty sound"; and in the language of Judge Thompson, in Wheaton *v.* Peters (*ubi supra*), "Indeed, it would be mere mockery for the law to recognize anything as property which the owner could not use safely and securely for the purposes for which it was intended, unless interdicted by the principles of morality or public policy." The proposition that performance on the stage is not publication, has been frequently sustained by the courts:

1. In Macklin *v.* Richardson (*Ambler*, 694), it was held, that the performance of a comedy at different theaters throughout a period of six years, under the permission of the author, and for which he was paid, had not impaired his

right of property, and the injunction granted by Lord CAMDEN was made perpetual. This case is singularly analogous to the present one, from the fact that the injury complained of was the printing of the piece by the defendant.

2. In Morris *v.* Kelly (1 *Jac. & W.*, 461) the comedy of the "Young Quaker," which had been performed many times had been advertised by the defendant to be produced without the consent of the proprietor; and an injunction was granted by Lord ELDON against the defendants, nearly forty years after the assignment of the copyright, and consequently after the period of the statute, so that it must have been issued on the common law right.

3. In Murray *v.* Elliston (5 *Barn. & Ald.*, 657) it was held that the performance of the drama "Marino Faliero" by the defendant, on the stage, was not an infringement of the copyright in the book, which the plaintiff had purchased from Lord Byron, which it clearly would have been if performance was publication. The decision in this case led to an amendment of the English statute of copyright, by which a right of exclusive representation was secured to the holder of the copyright of works suited to dramatic representation.

4. In Coleman *v.* Walthen (5 *T. R.*, 245) the same question arose, and it was again held that the performance of the comedy of "The Agreeable Surprise," was not an infringement of the copyright in the book which the plaintiff held; and the language of the court is express—"It was no publication."

5. In the United States it was held in the case

of Keene *v.* Wheatley (9 *Am. Law Reg.*, 23) where the comedy of "Our American Cousin," had been frequently performed by the plaintiff, that the right of proprietorship was not lost thereby; and the learned judge, after an elaborate discussion of the effects of public performance, on the rights of literary proprietorship, says: "All reasons founded in legal analogies, require that such an ultimate proprietary dominion should be thus retained by an author and his assigns." This case was decided upon the common law right, as the author was an alien, and no copyright existed.

6. In the case of Keene *v.* Kimball (23 *Monthly Law Rep.* 673), the same comedy, which had been continuously performed by the plaintiff, was again the subject of invasion; and one of the grounds of the defence was that the prior and continuous performance by the plaintiff was publication. But the court held that the representation of a dramatic work upon the stage is not a publication which would deprive the author or his assignees of the right of property. [The bill in this case was dismissed, on the ground that it was alleged that the defendant had acquired his copy by means of artists, whom he had sent to witness the plaintiffs own performance. In other words, that it was a memorized and not a surreptitious copy. We will examine this distinction hereafter.]

7. In Boucicault *v.* Fox (5 *Blatchf.*, 98) where the drama of "The Octoroon," had been publicly performed by the plaintiff for several months, it was held that his right had not been impaired thereby; and his copyright was sustained. The decision in this case by NELSON and SHIPMAN, JJ., is so directly in point, that we quote at some length:

"Whether a copyright had been taken out by the plaintiff ornot, the defendants would have had no right to the use of his manuscript play; and although they had obtained a copy without the consent of the plaintiff, a court of equity would have promptly restrained them from any use of such copy, beyond what the plaintiff had authorized. The reading of a manuscript lecture or discourse, or the performance of a manuscript play in public, by the author, does not confer upon the hearer any title to the manuscript, or any right to a copy, or to the unauthorized use of a copy which may surreptitiously or accidently pass into his hands. . . . The plaintiff then, being the original author of this play, his performance of it in public, *or the performance of it by the company at Winter Garden, with his consent, for a compensation to him, cannot be regarded as any evidence of his abandonment of the manuscript to the public, or to the profession of players.* . . . The common law protected this play so long as it was in manscript, or, at least, it was protected by equitable remedies (Macklin *v.* Richardson, *Ambler*, 694; *Curtis on Copyright*, 103). . . .There can be no evidence of abandonment to the public of any rights growing out of the authorship of a manuscript, drawn from the mere fact that the manuscript has, by the consent and procurement of the author, been read in public by him or another, or recited, or represented by the elaborate performances and showy decorations of the stage. If the reading, recitation or performance is conducted by his direction, by his agents, for his benefit and profit, with the sanction of the law, how can it be said to be evidence of his intention to abandon his production to the public? . . . The true doctrine is, that the literary property in the manuscript continues in the author, so long as he exercises control over

it, or has the right to control it; and, until its publication, no one has a right to its use, or that of its contents, without his consent. *Therefore any special use of it by him, in public, for his own benefit, is a use perfectly consistent with his exclusive right to its control, and is no evidence of abandonment.*"

8. In Crowe v. Aiken (4 *Am. Law Review*, 450), the bill was filed to restrain an unauthorized performance. The play in question, "Mary Warner," was the work of a foreign author, who had assigned the use of it in the United States, for a limited time, to the plaintiff. It had been repeatedly performed, both in London and in New York, by the plaintiff's sanction. The defendant there interposed the same defence which is here set up, that the prior performance by the plaintiff was a publication, because there was no restrictive notice or prohibition against any use of the play by the spectators; and it appears, singularly enough, that the present defendant was the party who furnished the fraudulent and surreptitious copy to the defendant in that case; and his counsel in *this* case vainly endeavored to sustain the defendant in *that* case. But the court held that "the author of any literary or dramatic work is the sole proprietor of the manuscript, and of its contents, and of copies of the same, independently of legislation, so long as he does not publish it or part with the right of property. This is called the common law right, and exists irrespective of copyright statutes. This right of property he can transfer, and a court of equity will protect him or his assigns in a proper case, just as it will the owner of any other species of property." And referring to the defence—that a restrictive notice was necessary to preserve the proprietary right—the court says: "It is not easy to see,

however, how a notice of reservation can have any effect on the right of the author or of the auditor. If the latter had a right to carry the play away in his memory, or take it down phonographically, or, in either case, to use or publish it, a notice prohibiting it could not affect or change that right." And referring to the fact of previous public performance by the plaintiff, the court say: "It cannot be true in this country that the lecturer has no right of property in his unpublished and unprinted lecture; that the clergyman has no right of property in his unpublished sermon—the work, it may be, in each case, of weeks of thought and labor—merely because he has repeated it to an audience. And I cannot comprehend why, because Congress has legislated about dramatic compositions, the author of a play should occupy different ground. The object of all copyright laws is to protect and regulate property in the product of the brain, not to annihilate it." And, in conclusion, the court say: "I am of opinion that, upon principle and authority, the author, or his assignee, of an unpublished play, has a right of property in the manuscript and its incorporeal contents; that is, in the words, ideas, sentiments, characters, dialogue, descriptions and their connection, independent of statutes; and that a court of equity can protect it. I am also of opinion that, as the law now exists in this country, the mere representation of a play does not of itself appropriate it to the public except so far as those who witness its performance can recollect it; and that the spectators have no right to cause its reproduction by phonographic or other *verbatim* reports, independent of memory."

9. In Boucicault *v.* Wood (7 *Am. Law Reg. N. S.*, 539) where the plays called "The Octoroon,"

and "Colleen Bawn," had been performed by the defendant, and where it did not appear that the plaintiff had perfected a copyright, but that he had performed the plays for a series of years keeping them unpublished and unprinted, the court say that, "under what is termed the common law right, independent and irrespective entirely of the statute, and because there has been no publication, the plaintiff is entitled to protection. He is entitled to the property in his work existing in manuscript, and nobody can use it without his consent, and if so used, every person so using it, is liable to respond in damages . . . He would have a right to perform his own plays, or to authorize their performance; or he would have a right to dispose of his property, either in whole or in part, to any one he chose." The jury in this case, which was an action for damages, rendered a verdict for the plaintiff.

Point V.

The defendant insists that, inasmuch as it appears that the defendant acquired his copy from one or more of the spectators who had witnessed the plaintiff's performance of the drama, it should be presumed that such copy was acquired in a lawful manner,—that is to say, that it was memorized. We submit, however, that no such presumption arises. A presumption is an inference as to the existence of a fact not actually known, arising from its necessary or usual connection with others which are known; and we respectfully submit that, however prodigious the power of memory may be, it is not a necessary or usual concomitant of witnessing a play, that the spec-

tators can, from memory alone, reproduce it *verbatim*, as in the present case. In the case of Crow *v.* Aiken (*supra*) it was held that no such presumption arose, and that if the defense of memorization is relied upon, there should be evidence clearly to establish it, and negative every other conclusion. In our case not only is there *no evidence* of memorization, but *no such fact was found.*

1. Presumptions in civil actions are of two kinds—presumptions of law; and logical presumptions, which have been defined to be the probable inference which our common sense draws from circumstances usually occurring in such cases. See *Phil. on Ev.*, ch. 9, note 283. It would not be a logical presumption, to infer that the author on the very first night of performance of a new drama had abandoned and relinquished the same to the public, or that he intended so to do. See Boucicault *v.* Fox (*ubi supra*).

Nor is it a "circumstance usually occurring in such cases," that the auditors could reproduce from memory alone the dialogue of an entire play, with the description of arrangements, the stage directions, the division of acts and scenes, identical in all respects with the plaintiff's copy (see folio 34 of printed case), in the identical language of the author.

2. But even if it were so, the right acquired by the auditor is personal. Where a play is performed before an audience, more or less select or indiscriminate, each auditor may have been presumed to have some remnant of the play in his mind, after the performance. One can tell the plot, one can describe the situations, one can remember the dialogue in places, one can recall the music, one will remember the tableaux, but

no one can or will remember all these things. The law allows to each the right to the full and unrestricted use of his own memory. He who remembers music can sing and play it. The memorizer of the circumstances may describe, criticise and compare them. He who recollects the dialogue can repeat it to his friends or others. Each can do with his own recollections whatever his recollections enable him to do. But this right of repetition is purely personal in the auditor and cannot be assisted by notes, or by memoranda, and does not extend to writing or print. Macklin *v.* Richardson (*supra*). The auditor then cannot take notes to assist his memory, and then write out and publish. The unlawfulness here consists in the use made—the reproduction in print. Doubtless the critic has a right to make notes of any point to aid his criticism. And this is analogous to the rule in Abernethy *v.* Hutchinson (*supra*) that any attendant at a technical lecture may take notes to assist his memory, in absorbing instruction received, and making it a part of himself, but in using this information afterwards, the auditor must think it himself, and must not, if he publish it, publish it either in the words, or as the words of the lecturer. So the critic can only use the real words of the play, as illustrations of his criticism. The auditor may not then avail himself of the aid of others in his own memorization. Although the play is presented to a large audience, yet the contract of exhibition is a separate contract with each auditor. Each is admitted by separate card, each has his assigned seat, each is entitled to his own use of the right of observation. There is no privity of contract between one auditor and another. A combination of several persons to take down a play would be a conspiracy to defraud, as a com-

bination to hiss an actor would be a conspiracy. Gregory *v.* Duke of Brunswick, 6 *M. & G.*, 205; Clifford *v.* Brandon, 2 *Campbell*, 358; Rex *v.* Lee, cited 1 *C. & R.*, 29. The rights acquired by admission to a theater are individual and not collective—in the respective auditors, and not in the audience. In Keane *v.* Kimball, 16 *Gray*, Judge HOAR declares the rule to be that the actors who have been taught a play by consent of the author may repeat what they have learned, unless restrained by express or implied contract; and if persons by frequent attendance at a theater have committed to memory any part or the whole of a play, they have a right to repeat what they have learned to others; but the right to print or publish, or use a lecture or written discourse, is denied. The right to remember a medical lecture for use in practice or instruction is admitted, but the right to commit it to paper for publication, or for oral delivery is denied. The right to remember a song or a tune, and to play or sing it from memory is admitted; but the right to copy and publish a musical composition is denied. This case is very instructive, for the pleadings raise the precise question, as in that case, Kimball had sent his artists to the plaintiff's own theater to imitate the piece as played by the plaintiff, and the use of a copy of the play to produce it was not alleged in the bill. It is therefore a decision in point, that the right of memorizing and reproduction is personal and individual only. This decision was concurred in by BIGELOW, Ch. J., by DEWEY, METCALF, MERRICK, and THOMAS, JJ., constituting the full bench of the supreme court of Massachusetts.

We hold the law to be well settled both on principle and authority, that the common law rights of all authors in the United States, whether aliens or natives, and their assignees, to *unpublished*

dramatic manuscripts, are identical with the rights of a native author in his copyrighted production: with this distinction, and this only; that the copyright is limited in point of time, while the common law right is perpetual.

The Statutory protection extended to the copyrighted publication is identical to that which the Law gives to the author *prior* to publication.

It might as well be claimed that the author in the one case could be deprived of his copyright by the memorization of his play at its first public performance, as that the author in the other case, of an unpublished and uncopyrighted drama could be deprived of his common law rights in the same manner.

Point VI.

It is set up, as a defense in this action, and it is found as a fact by the court, that there was, at the public performance of the play, under the author's sanction, no restrictive notice or prohibition against carrying away the comedy, by memory or otherwise, and using or printing the same; nor was any notice to that effect posted in view of the spectators (fol. 33). The same defense was interposed in the case of Crowe *v.* Aiken, by the same counsel, representing the same defendant, in point of fact, under another name. The defense was ineffectual. In the opinion of Judge DRUMMOND, such want of notice did not affect or change the right of the author. This doctrine of notice first appeared in Keene *v.* Clarke (5 *Robt.*, 38); and although it was held in the case now at bar to have been *obiter dicta* in that case, we propose to examine it at some length.

1. Notice is often needed to create a right—as notice of intention to claim an easement; notice of non-payment to charge an indorser; notice of overloading a water wheel. Hatch *v.* White (22 *Pick.*, 518). Notice is often necessary to relieve one from future claims—as notice of dissolution of partnership. Notice cannot make an illegal act valid (Wilson *v.* Mason, 1 *Cranch*, 45); *but notice to relieve from the natural and lawful consequences of a voluntary act, is a thing wholly unknown to the law.*

2. The performance of a play by its legal owner, is a lawful act. It is a use by himself of his own property, whose value consists entirely in user; and it cannot be held that he must give notice, to prevent a loss of his property. Notice cannot prevent the ordinary and usual consequences of his act from following it; and notice on a ticket, that each auditor should stop his ears, and close his eyes, would clearly not be binding; nor would a notice against allowing the play to make an impression on the mind. Each auditor is entitled, notice or no notice, to see, hear, and understand, so far as he can, the play, and have it make the mental impression natural from its exhibition, and the character of the mind impressed. That impression is the auditor's. He can carry it away. It may work in his mind. It may evolve important or unimporatnt results. The arrangement, order, plot, dialogue, cast and incidents are not the result of hearing the play; and results only could be affected by notice. These are the operations of the author's mind, and it is these which the appellant's counsel asks this court to hold are conveyed to the auditor and lost to the author by a lack of notice. The contract of admission to a theater does not in terms, forbid an auditor to stenograph the play, yet such act is unlawful (*cases supra*).

The facts found, show that the procurement was from one or more persons who had seen or heard the performance without restrictive notice. It is *not found* that they procured the piece from *seeing* and *hearing* it. The court is asked to presume the fact—"*omnia præsumuntur contra spoliatorum.*" There is no privity found. There is no privity possible between the acts and contracts of an auditor, after leaving the theater, and the manager of that theater. Whatever consequences follows from the executed contract, follow with or without notice. A violation of rights after notice, changes a tort simple to a malicious tort. The question of notice can only affect the question of damages. *Notice, to entitle an owner to damages for a trespass, or lack of notice, to be pleaded as justification for a trespass, is absurd.* If a dramatic author dedicates to the public his property by representation—or the lecturer his lecture—or the clergyman his sermon—the public get it, notice or no notice. Notice could only affect the auditors, —dedication affects everybody.

Special auditors may acquire easements of criticism, but to maintain any dedication by representation would be to maintain that he who lays out a turnpike over his own land and takes toll for travel, thereby parts with the growing crops on each side of the road. The defendant here claims a dedication to himself, because notice was not brought home to other persons. The appellant's case proceeds on a confusion of ideas. The author has granted a specific *knowledge of his work to the auditors. The defense assumes that a specific knowledge of his work is the work itself*, and a grant of the work is assumed. Publication in print is a grant of the ideas themselves. By publication in print every one may have them in his own library. By representation, they sim-

ply excite emotions, and exert a mental stimulus. By publication the ideas are parted with, so that the public has the means, each for himself, of renewing the mental stimulus at will without a new contract, and without a new payment. By representation, the mental stimulus is renewed only by a new contract.

As above stated, the notion of restrictive notice first appears in an opinion of a late chief justice of the superior court, in 5 *Robt.*, 38, and in the case at bar was held to have been wholly *obiter dicta*, and was expressly overruled in Crowe *v.* Aiken, *ubi supra*. But we cannot leave that decision of the chief justice without calling the attention of the court to several singular inaccuracies in the opinion. The late chief justice says: "A solitary decision in a suit in equity (Macklin *v.* Richardson, *Amb.*, 694), upheld the right," &c. If the learned chief justice intended to say that it was the *only* case in equity upholding the right of literary property in unpublished works, then he must have overlooked the cases of Webb *v.* Rose; Pope *v.* Curl; Forester *v.* Waller; Duke of Queensbury *v.* Shebbeare, and Dr. Paley's case, as well as the more recent case of Prince Albert *v.* Strange. And to this may be added the case of Morris *v.* Kelley, which, although reported as a case of copyright, was in reality an injunction granted on the common law right.

It would not perhaps be fair to say that he had overlooked the case of Boucicault *v.* Fox, because that was a case on the common law side of the court, and not an action in equity. In another part of that opinion he says, that "Miller *v.* Taylar was followed by another—Donaldson *v.* Beckett, in the same volume." It is true that it follows it in the numerical order of paging, but Lord BROUGHAM says, 4 *H. of L.*, 961 that it *reversed* Miller *v.* Taylor upon the main point,

but upon the general question of literary property at common law, no judgment whatever was pronounced.

Again, the chief justice says, that Donaldson *v.* Beckett was entirely overthrown by the subsequent decision in the House of Lords, referring to Jeffreys *v.* Boosey 4 *H. of L.*, 815); but as the latter case only decided that an alien, resident abroad, could not acquire, or by assignment to an English subject, enable the latter to acquire an English copyright, it is difficult to see how this case entirely overthrows the other, which was also a decision of the House of Lords. And the learned chief justice, still referring to Jeffreys *v.* Boosey, said that it had been followed in this country by Wheaton *v.* Peters (8 *Pet.*, 591); but, as the latter case was decided and reported several years before the argument of Jeffreys *v.* Boosey, and was cited by counsel, and referred to by the judges in delivering their opinion in that case, it really is difficult to understand how Wheaton *v.* Peters could be said to have followed Jeffreys *v.* Boosey.

Lastly: the approbation of the late chief justice, of the presumption adopted by Judge BULLER in Coleman *v.* Waltham—that a copy of a drama might be acquired by an auditor, by the aid of memory alone, has not been concurred in by the other judges. This dictum of Judge BULLER, was pronounced by CADWALLADER, in Keene *v.* Wheatley, to have been altogether *extra-judicial*, and contrary to the opinion of Lord KENYON, acted upon at the trial; and was not adopted by the lord chancellor in Abernethy *v.* Hutchinson, nor by Judge DRUMMOND, of our own United States court, in Crowe *v* Aiken.

The fallacy, of restrictive notice being essential or effectual for the preservation of proprietary rights, has not received respectful consideration

in any case, and is certainly in conflict with all legal analogies.

If private grounds are not placarded with notices "do not trespass," will it be contended that the absence of such notice, makes it lawful for the public to commit waste or trespass? That the absence of a notice "post no bills," gives a free license to any one to deface the walls with placards or advertisements? That the giving of a notice "beware of spring guns," makes it any less a homicide if a life is lost? That the giving of a notice "not liable for more than $100 baggage," renders the common carrier exempt from payment of full damages? That the want of a notice "thou shalt not steal," makes property free to the hand of every plunderer?

Point VII.

But one more defense remains to be examined.

The appellant contended at the General Term, as he did also in the case of Crowe *v.* Aiken, with an ineffectual result, and as he will doubtless here contend,—that the public performance of the drama in England, under the sanction of the author, was a publication, because the statute, 5 & 6 *Vict.*, ch. 45, § 20, provides that the first performance of a drama is deemed equivalent to the publication of a book; and in support of this proposition he will rely on the case of Boucicault *v.* Delafield (33 *Law J. N. S.*, 38). To this proposition we answer:

1. There is no such statute proved in the case. It is not in evidence—it is not found as a fact—it cannot be proved by books—nor by reading from certified copies, as is provided in the case of our

own laws. It must be proved as a fact by oral testimony of witnesses familiar with the English statute law. It was neither proved, found nor admitted, and it cannot be raised on this appeal, because it presents a new fact.

a. "The proper course to ascertain the law of a foreign country, is to call a witness expert in it, and ask him on his responsibility which that law is, and not to read any fragments of a Code which would only mislead." Per ERLE, J., in Cocks *v.* Purday, 66 *Eng. Com. Law*, 268; Wildes *v.* Savage, 1 *Story C. C. R.*, 22; where a commission was issued to England to examine Sir Frederick Pollock and others as experts; 1 *Greenl. on Ev*, 486 and note.

2. If it were a fact, it could only be a bar to the rights of the plaintiff in an English tribunal—to recover the statute penalties—but until it becomes the law, that the statutes of one country or of one State are to have an extra-territorial force—it cannot affect his common law right elsewhere. The attempted defense of the appellant under the assumed English statute, is an attempt to override the common law of this State by a foreign statute in derogation of that law.

3. But the statute in question does not sustain the defense, even if we admitted its existence, for the purposes of this argument. The section in question (§ 20 of 5 & 6 *Vict.*, ch. 45), amends the act of 3 & 4 *Wm. IV.*, ch. 15, so as to extend the term of the sole liberty of representing dramatic pieces, to the full time provided for the continuance of copyright in books under the present act, and making the provisions thereof applicable to such dramatic and musical compositions "as if the

same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition, shall be deemed equivalent, *in the construction of this act*, to the first publication of any book;" and then provides, that only the title of a play, with the name and residence of the author and proprietor, and date and place of first representation need be registered.

The italics are our own.

a. But the case cited by the appellant's counsel *does not arise under that statute.*

Boucicault filed a bill for an injunction to restrain the defendant, Delafield, from the unauthorized representation of a drama called "The Colleen Bawn."

The cause was heard before Vice-Chancellor Wood, and it appearing in proof, that the drama in question had been publicly performed by plaintiff in New York, before he applied for registration, for the purposes of an English copyright; the vice chancellor held, that the copyright was invalid, under section 19 of 7 *Vict.*, ch. 12; and dismissed the bill.

The section enacts, that neither the author of any book, nor the author of any dramatic piece, &c., "which shall, after the passage of this act, be first published out of her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this act."

The act in question is known as "The International Copyright Act," and it provides (§§ 2, 5) that by orders in council thereafter to be issued, copyright privileges may be

granted and acquired in works first published abroad; and the vice chancellor held that, inasmuch as no order in council had been issued regulating copyright, or creating it, between the United States and England, that the plaintiff could not acquire any copyright under that act; and as his drama had been previously performed in the United States, the bill was dismissed.

In effect deciding that for the purposes of copyright, *under the act of* 7 *Vict.*, ch. 12, the first performance of a dramatic piece must be in some country with which international copyright regulations had been created by an order of council.

In the case now under appeal, the *first* public performance was had in *England* (Findings of Fact, fol. 32), and the plaintiff's rights had not been acquired *prior* to such performance (Findings of Fact, fol. 31).

b. This is giving an effect to the construction of the word "published," directly in conflict with that given by the court, in the case of Murray *v.* Elliston (*ubi supra*), which arose under sections 4 of 54 *Geo. IV.*, ch. 156. The gist of the decision of the vice chancellor is, that under the statute, performance is a statutory publication and only affects statutory rights.

In the tribunals of this country, the same question has been three times solemnly adjudged the other way. In Boucicault *v.* Fox, 5 *Blatchf.*, 88, where the same play of the Octoroon had been for a long time publicly performed at the Winter Garden Theater, before taking out copyright, it was held, by Nelson and Shipman, JJ., that such prior performance had not impaired the right to

take subsequent copyright; and in Roberts *v.* Meyers, *supra*, Judge SPRAGUE held the same doctrine—and these views have been adopted by Judge DRUMMOND in Crowe *v.* Aiken, *ubi supra*, who, after discussing the point at large, concludes: "It follows, from what has been said, that a definition of the word representation by a British statute, is not operative as such in this country."

And these decisions are in analogy with Prince Albert *v.* Strange (*supra*), where printing and circulation was held not to be publication, and an injunction was granted, which was affirmed on appeal.

c. And another objection to the defence is, that the defendant did not by his *answer* set up this alleged statutory publication; his defense on the record was and is, that he obtained his copy from a presumed memorization by one or more spectators.

If under the decision of Hunt *v.* Johnson, (44 *N. Y.*, 27), the statute of a sister State cannot be produced in the appellate court, unless first produced on the trial like other proof, *a fortiori*, no English statute can be.

Point VIII.

The respondent seeks to be protected against an invasion of his property; against an infringement, which has almost destroyed the value of his manuscript; and to be supported in his rights thereto at common law, and because it is but common right. Aliens and citizens are alike before the law in the right of copy before publication. The policy of our country has ever been to extend liberty and equal-

ity, before the law, to all mankind, "*Tros Tyriusve nullo mihi discrimine agetur*," and to vindicate the rights of property in every court, irrespective of race, station, or citizenship.

The plaintiff's right—upon the determination of which by this court, must stand or fall the right of every author in his literary production—has been sustained by some of the ablest jurists of modern times. It would be beyond the limits of a brief to enumerate them all, but Lord ELDON (2 *Swanst.*, 424), Lord HARDWICKE (2 *Atk.*, 342), Lord Chancellor APSLEY (*Ambler*, 739), Lord TALBOT (1 *Wm. Bl.*, 331), Sir JOSEPH JEKYLL, Master of the Rolls, (*Id.*, 331), Lord MACCLESFIELD (*Id.*, 330), Sir WILLIAM BLACKSTONE, Lord MANSFIELD, Judges ASHTON and WILLES (4 *Burr.*, 2408), Sir Knight BRUCE (2 *De Gex & Sm.*, 692), Lord Chancellor COTTENHAM (1 *McN. & G.*, 25), Mr. Justice EARLE, Lord ST. LEONARDS, and Lord BROUGHAM, in the zenith of his powers (4 *H. of L.*, 815), have upheld the right in the tribunals in England. And in our own judiciary, a list equally eminent—Judges MCLEAN and THOMPSON of the Supreme Court of the United States, Judges CADWALADER, DRUMMOND, SPRAGUE, NELSON and SHIPMAN, of the several United States Circuits, Judges MONELL, FREEDMAN and DUER of the Superior Court of New York, and Judges HOAR, MERRICK, DEWEY, METCALF, and BIGELOW, Ch. J., of the Supreme Court of Massachusetts—all of whom have approved and sustained the right, mostly in

elaborate opinions; while the only judges who "have denied the faith" are Chief Justice BARBOUR, of the Superior Court (reversed in 2 *Abb. Pr. N. S.*, 341), and Judge JONES, dissenting in the case now on appeal, neither of whom gave opinions.

Point IX.

The order granting a new trial, and the judgment thereon, now under appeal, should be affirmed; and, pursuant to the appellant's stipulation, judgment absolute should be rendered against him, with costs.

WM. D. BOOTH,
of Counsel for Respondent.

Court of Appeals.

On Appeal from the Superior Court of the City of New York.

HENRY D. PALMER,

Respondent,

AGAINST

ROBERT M. DE WITT,

Appellant.

CASE AND EXCEPTIONS.

WILLIAM D. BOOTH,

Att'y for Respondent.

LARNED & WARREN,

Att'ys for Appellant.

NEW YORK:

RUSSELL'S AMERICAN STEAM PRINTING HOUSE,

28, 30, 32 CENTRE STREET.

1870.

IN THE SUPERIOR COURT,

OF THE CITY OF NEW YORK.

HENRY D. PALMER

against

ROBERT M DE WITT.

City, County and State of New York, ss.

The complaint of the plaintiff above named respectfully shows to the Court:

3 I.—That immediately prior to the 1st February, 1868, one T. W. Robertson, of London, England, a dramatic author of great ability and popularity, being the author and composer of a certain drama or comedy, in four acts, entitled "Play," for a valuable consideration sold, transferred, assigned and set over unto the plaintiff the exclusive right and privilege of enacting, performing, representing, producing upon the stage, printing and publishing, or causing, licensing, or permitting to be enacted, performed, represented, produced upon the stage, printed and published,
4 within and throughout the United States, the aforesaid drama or comedy, in four acts, entitled "Play," as aforesaid, together with all his rights and privileges therein and thereto, as the author thereof, throughout the said United States, and all benefits and advantages to be derived therefrom.

II.—That at the time of such purchase, sale and transfer, the said Robertson had acquired a great reputation as a dramatic author, having produced some of the finest comedies introduced on the modern stage, among which the
5 comedies of "Caste," "Ours" and "Society" had been eminently successful; and any new comedy from such author

was of very great value to the exclusive literary proprietor thereof; and the plaintiff in the purchase of the comedy, "Play," as aforesaid, anticipated great pecuniary advantage from and by reason of the celebrity and popularity of its said author.

III.—And the plaintiff further shows that, at the time of the purchase aforesaid, to wit, on the 1st February, 1868, the said comedy or drama was an unpublished dramatic composition, adapted and designed for scenic representation, and was of great literary and dramatic merit; and that it 6
had never been at that time, nor has it ever since been, printed or published in print by its said author or by any one under his sanction, permission or consent, nor has it since the said 1st of February, 1868, been printed or published in print by the said plantiff, or any one with his consent; and that said play, at said date, had never been publicly performed or enacted on any stage, but the same remained wholly and exclusively the literary property of the said author until the transfer of his right therein to the plaintiff, as above set forth.

IV.—And the plaintiff further alleges that the said comedy was never produced or publicly performed on any stage, 7
in this country or elsewhere, until subsequent to the acquisition of the plaintiff's title as aforesaid; that its first performance was on the 15th February, 1868, in the City of London, at the Prince of Wales Theatre, and under the sanction of the author, but that said author did not thereby confer upon or abandon to the defendant, or to any other person, the right or privilege of printing or publishing his said comedy or otherwise interfering with his right of property therein, nor was the defendant thereby fairly enabled to print or publish the same; and that the said author has never consented to the printing or publishing and sale thereof by the defendant or any other person, nor has the 8
plaintiff, as the assignee thereof, ever consented thereto, or acquiesced therein.

V.—That on or about the 10th day of February, 1868, the plaintiff duly received from the said author, in consummation of his said purchase, a full and complete manuscript copy of said comedy called "Play," as aforesaid (and the plaintiff still has and owns the same, as the literary proprietor of the comedy for the United States as aforesaid, and keeps the same unprinted and unpublished), and is now engaged
9 in selling and licensing the right to perform and enact the same.

VI.—And the plaintiff further shows that, on the 18th day of February, 1868, he caused public notice by advertisement to be published in the *New York Herald*, a newspaper of large daily circulation in the City of New York and elsewhere, of his right of ownership in said play, and that he hereto annexes a copy of said advertisement, marked "A," and which he prays may be taken as a part of this his complaint; and that, for the more general dissemi-
10 nation of such notice, he caused the same to be repeated tri-weekly in said newspaper during the residue of the said month of February and during the whole month of March, 1868.

VII.—And the plaintiff further alleges that the defendant above named is a publisher, doing business in the said City of New York, and that on or about the 25th day of said March, and while the notice of said plaintiff's rights was being published tri-weekly as aforesaid, in wilful disregard of the rights of the plaintiff, and without any knowledge or consent on the part of the plaintiff, and well knowing that the act would greatly injure if not irreparably destroy all
11 the benefit to be derived by said plaintiff from his literary proprietorship of said play, did print, publish and offer for public sale, and sold certain printed copies of the aforesaid comedy called "Play" which was the property of plaintiff by virtue of the purchase from the author as aforesaid; and that he still continues to print and publish, and still openly offers for sale and sells copies of said comedy; and that the plaintiff annexes hereto, marked "B," one of such copies,

printed and published by the defendant and sold by him at his place of business in said City of New York.

VIII.—And the plaintiff further alleges that the copies so printed and published and sold by the defendant are 12
identical in all substantial respects, both of plot, arrangement, incident, action, description, distribution of characters, general stage directions, division of acts and scenes, and dialogues throughout, with the comedy purchased by the plaintiff from the author as aforesaid, whose rights for the United States the said plaintiff has acquired and now owns, and that said defendant publicly claims that it is the same identical comedy, and has elaborately printed and published the same with especial reference, and to afford every facility for its public, dramatic and scenic representation; and the plaintiff alleges that such printing, publication and sale of copies thereof will, if permitted to continue, deprive the plaintiff of all the advantages and profits to be derived 13
from his purchase from the author as aforesaid.

IX.—And the plaintiff further alleges that, by reason of the wrongful acts and doings of the said defendant, he has sustained great damage, and that he is liable to sustain irreparable wrong and injury by reason of the facility which the defendant has afforded to managers and actors to produce the said comedy by means of such printed copies, and to deprive the plaintiff of the benefits and emoluments which he would otherwise have derived from selling copies thereof in manuscript himself, or to be subjected to heavy or vexatious litigations in many different cities in the United 14
States to restrain the performance of the said comedy from and by means of copies printed, published and sold by the defendant as aforesaid, and that he has interfered with and injured the right and privilege of the plaintiff to print and publish the said comedy for his own use and benefit, and still continues the said wrong, injury and damage, and intends so to do.

X.—Wherefore, the plaintiff prays judgment of this Court:

1st. That the said defendant, Robert M. De Witt,
15 agents, employees, workmen and clerks, may be perpetua
enjoined and restrained from printing, publishing, sell
or offering for sale, or causing to be printed, published
sold, or offered for sale, any copy or copies of the certa
drama or comedy called "Play," by T. W. Robertson, ge
erally known as the author of "Caste," "Ours," &c., or a
colorable imitation or adaptation of said comedy calle
"Play," or permitting or suffering any copy or copies
parts thereof to be sold, delivered, removed, transferred
taken away by any person or persons whatever.

16 2d. That the said defendant do account under oath fo
all the copies that have been heretofore printed, publishe
or sold by him, together with the number remaining o
hand or unsold or undelivered.

3d. That he be adjudged to surrender and deliver up to
be destroyed all the copies of said comedy now remaining
on hand unsold or undelivered, together with all part or
parts thereof, whether complete or incomplete.

4th. That the plaintiff may have such other order or re
lief in the premises as to the Court may seem just and
proper.

17 5th. That the plaintiff may have and receive such dam
ages as to the Court may seem proper in the premises, to
gether with the costs of this action.

WM. D. BOOTH,
Att'y for Plaintiff,
62 Wall street.

City and County of New York, ss.

Henry D. Palmer, of said city, being duly sworn, says
that he is the plaintiff in this action; that he has read the
foregoing complaint and knows the contents thereof; that
18 the same is true of his own knowledge, except as to the

matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

HENRY D. PALMER.

Sworn to before me this eighth day of April, 1868.

WM. HAZARD FIELD,
Notary Public,
City and County of New York.

EXHIBIT "A."

NOTICE TO MANAGERS.

The undersigned gives notice that he is the literary proprietor of the following unpublished manuscripts: 19

"LONDON BY NIGHT,"

a drama, in four acts, by Dion Boucicault;

"PLAY,"

a drama, by T. W. Robertson; and

"FOUL PLAY,"

by Chas. Reade and Dion Boucicault.

Any parties infringing upon his rights will be prosecuted to the fullest extent of the law. Managers desirous of producing the above plays can address

H. D. PALMER,
Niblo's Garden. 20

EXHIBIT "B."

The following is a copy of the title-page of the printed book, marked Exhibit "B"—the printing of the whole book being waived by the parties:

"Price 15 Cents.
De Witt's Acting Plays.
(Number 21.)
"PLAY,"
A Comedy in Four Acts.
By T. W. Robertson,

Author of "Caste," "Ours," "David Garrick," "
Love," "A Rapid Thaw," "Society," "Shadow
Shaft," etc., as first produced at the Prince of W
Theatre, London, under the management of Miss M
Wilton, February 15th, 1868;

To which are added

a description of the costume, cast of the characters,
trances and exits, relative position of the performers
the stage and the whole of the stage business.

New York:
ROBERT M. DE WITT, Publisher,
No. 13 Frankfort street."

NEW YORK SUPERIOR COURT.

HENRY D. PALMER

against

ROBERT M. DE WITT.

The defendant, answering the complaint of the plaint
denies, upon information and belief, that one T. W. Robe
son, of London, England, being the author of the certa
drama or comedy entitled "Play," prior to the first day
February, 1868, or at any time, sold, assigned, transferr
and set over to the plaintiff the exclusive right and p
vilege of enacting, performing, representing, produci
upon the stage, printing and publishing, or causing, licen
ing or permitting to be enacted, performed, represented
produced upon the stage, printed and published within a
throughout the United States, the said drama or comed
as alleged in said complaint, or that he had any righ
power or authority to transfer and convey any such exclu
sive right and privilege.

And further answering, the defendant denies any knowledge or information thereof sufficient to form a belief as to 24
whether or not the said comedy had, prior to the first day of February, 1868, or has since been printed or published in print by its author, or by or with the consent of the plaintiff, or whether or not, at said date, the same remained the exclusive literary property of said author, or whether or not the first performance was on the fifteenth day of February, 1868, in the City of London, at the Prince of Wales Theatre, or whether or not such performance was under the sanction of its author, or whether or not said author, or the plaintiff, has ever consented to the printing, publishing and 25
sale of said comedy, or whether or not the plaintiff, on the tenth day of February, 1868, or at any other time, received from said author a manuscript copy of said comedy, or is now engaged in selling, licensing the right to perform and enact the same, as is alleged in said complaint: he therefore denies the said several allegations as therein set forth.

And further answering, the defendant denies the allegation in said complaint that the said author of said comedy, by its public representation in London, did not thereby confer upon or abandon to the defendant, or to any other person, the right or privilege of printing or pub- 26
lishing the said comedy; nor was the defendant thereby fully entitled to print or publish the same.

And he denies that the plaintiff was or is the literary proprietor of said comedy for the United States, in any sense which precludes the defendant from printing, publishing and selling the same therein.

And he denies that he printed and published said comedy in wilful disregard of the rights of the plaintiff; and he denies that the plaintiff has sustained great damage, or any damage by reason of any wrongful acts or doings of the defendant, or that the defendant has committed, or in- 27
tends to commit any wrongful act in the premises.

And further answering, the defendant alleges, upon information and belief, that the said drama or comedy, called "Play," was during the months of February and March last, with the sanction of the author thereof, many times publicly

performed or represented, in the presence of large audiences, at one or more of the principal theatres in London, England, and that the tickets admitting the spectators to said performances contained no notice or prohibition against carrying the said comedy away by memory or otherwise,
28 and using, printing or publishing the same, nor was any notice to that effect posted in said theatre or theatres, in view of such spectators; and he also alleges that he received the words of said comedy, and description of the arrangement, general stage directions, and division of acts and scenes, as published by him, from one or more persons, who obtained the same from its performance on the stage, at such public representation, while witnessing the same as such spectators, as they lawfully might, and not otherwise.

Wherefore, he demands judgment that said complaint may be dismissed, with costs.

29

LARNED & WARREN,
Defendant's Attorneys.

City and County of New York, ss.

Robert M. De Witt, the defendant, being sworn, says that the foregoing answer is true of his own knowledge, except as to the matter therein stated on information and belief, and as to those matters he believes them to be true.

ROBERT M. DE WITT.

Sworn to before me, this 28th day of April, 1868,

JOHN B. IRELAND,
Notary Public,
N. Y. Co.

30

SUPERIOR COURT.

HENRY D. PALMER
against
ROBERT M. DE WITT.

This cause coming on to be tried before me, on the 8th day of April, 1869, I do find as follows :

First.—I find that on and prior to the 1st day of February, 1868, one T. W. Robertson, a resident of London and a citizen of Great Britain, was the sole author and composer of the drama mentioned in the complaint, called " Play." 31

Second.—That on said 1st day of February, 1868, the said Robertson, for a valuable consideration, executed and delivered to the plaintiff a certain instrument in writing, by which he sold, assigned and set over to the plaintiff in this action the exclusive right and privilege of printing and publishing, enacting, performing, representing and producing on the stage, licensing or permitting to be printed, published, enacted, performed, represented and produced on the stage, within and throughout the United States, the said drama, called " Play," together with all his rights and 32 privileges therein and thereto, as the author thereof, throughout the United States, and all benefits to be derived therefrom, and delivered to said plaintiff the manuscript of said drama.

Third.—That prior to the 15th day of February, 1868, said comedy of " Play" had not been printed, published or performed.

Fourth.—That on the 15th day of February, 1868, and for a great number of times thereafter, the said comedy was publicly performed and represented at the Prince of Wales 33 Theatre, in the City of London, by and with the sanction of

the said T. W. Robertson, in the presence of large audiences, and that the tickets admitting spectators to said performance, which were purchased by them, contained no notice or prohibition against carrying the said comedy away by memory or otherwise, and using or printing the same nor was any notice to that effect posted in said theatre in view of such spectators.

Fifth.—That the defendant received the words of the
34 comedy, and a description of the arrangement, general stage directions, division of acts and scenes, as printed by him, from one or more persons who had seen or heard the same publicly performed at said public representation in England.

Sixth.—That on the 25th day of March, 1868, the defendant printed and sold certain printed copies of the said comedy called "Play," identical in all respects with the plaintiff's copy, and still openly offers for sale and sells copies of said comedy; and that the plaintiff's exhibit, marked "B," is one of such copies, printed, published and sold by the defendant.

Seventh.—That by reason of the acts of the defendant
35 the plaintiff has sustained damages incapable of computation, in not having the exclusive sale of said comedy.

As a conclusion of law, on the foregoing facts, I find—

That the defendant is entitled to judgment; that the complaint be dismissed, with costs.

C. L. MONELL,
Justice.

At a Special Term of the Superior Court, held in and for the City of New York, on the 27th day of April, 1869—

Present—Hon. C. L. MONELL, *Justice.* 36

HENRY D. PALMER

against

ROBERT M. DE WITT.

This cause coming on its order on the trial calendar of this Court, and the same having been duly tried before me, after hearing William D. Booth, Esq., for the plaintiff, and Ira D. Warren, Esq., for the defendant—

It is ordered, adjudged and decreed herein, that the plaintiff's complaint be dismissed, and that the defendant recover of the plaintiff the sum of one hundred dollars, his costs 37 and disbursements in this action, as taxed by the Clerk of this Court.

SUPERIOR COURT.

HENRY D. PALMER

agst.

ROBERT M. DE WITT.

Sirs:

I.—Take notice, that the plaintiff hereby excepts to the conclusion of law found by the Justice who tried the above 38

entitled action—that the defendant was entitled to judgment that the complaint be dismissed with costs.

II.—The plaintiff further excepts that said Justice did not find, as matter of law, that the plaintiff was entitled to judgment in this action, as was prayed for in the complaint herein.

III.—That said Justice did not find, as matter of law, that the plaintiff was and is the literary proprietor of the drama called "Play," mentioned in the complaint, throughout the United States, and entitled to the exclusive use and
39 benefit thereof.

IV.—That said Justice did not find, as matter of law, that the public performance of said drama, at the Prince of Wales Theatre, in the City of London, was not a publication, or a relinquishment of any proprietary rights in said drama, although the tickets admitting spectators to such public performance contained no restrictive notice, and no notice was given reserving such proprietary rights.

V.—That said Justice did not find, as matter of law, that the copy of said drama, as received by the defendant from
40 spectators who had seen or heard such public performance in England, did not confer any rights thereto or therein upon the defendant, and that the publication by the defendant from such copy, so acquired, was such an infringement of the plaintiff's rights as entitled him to an injunction restraining the publication of said drama by the defendant.

WM. D. BOOTH,
Plaintiff's Attorney.

To LARNED & WARREN, Esqs.,
Defendant's Attorneys.

SUPERIOR COURT. 41

HENRY D. PALMER
against
ROBERT M. DE WITT.

Sirs—Take notice, that the plaintiff hereby appeals to the General Term of this Court from the judgment entered in this action on the 27th day of April, 1869, dismissing the complaint herein, and from the judgment that the defendant recover of the plaintiff the sum of one hundred dollars for his costs and disbursements in this action.

Dated, New York, May 4th, 1869.

Yours respectfully, 42

WM. D. BOOTH,
Plaintiff's Attorney.

To LARNED & WARREN, Esqs.,
Defendant's Attorneys.

To JAMES M. SWEENY, Esq.,
Clerk, &c.

NEW YORK SUPERIOR COURT.

HENRY D. PALMER
against
ROBERT M. DE WITT.

Opinion at Special Term.

SPECIAL TERM, APRIL, 1869. 43

Decision by MONELL, *Justice.*

This action was tried before me, without a jury, upon

substantially the same facts as were before the Special Term, on a motion to dissolve the injunction. No new or additional facts have been proven to weaken the effect which should be given to the decision made on that motion. The answer alleges that the play was performed at one or more of the principal theatres in London, and that the defendant received the words of the play and a description of the arrangements, &c., from one or more persons, who obtained the same from its performance on the stage as a
44 spectator, while witnessing the representation, and the proof contained in the stipulation furnished on this trial is to the same effect.

The question involved having seemingly been carefully examined by the learned Justice who heard the motion to dissolve the injunction, and he having, after deliberation, decided that the injunction should be dissolved, assigning his reason therefor in writing, I feel bound to follow his decision, and to consider it as *res adjudicata*, without expressing an opinion as to the correctness of such decision, and leaving myself open to examine the case, should it
45 come before me as a member of the General Term.

There must be judgment for the defendant, with costs.

At a General Term of the Superior Court of the City of New York, held at the City Hall in the City of New York, on the 16th day of June, 1869—

Present—Hon. C. L. Monell,
S. Jones,
J. J. Freedman,
JJ.

Henry D. Palmer
against
Robert M. De Witt.

46

The appeal from the judgment entered in this action on the 22d day of June, 1869, that plaintiff's complaint be dismissed, and that the defendant recover of the plaintiff the sum of one hundred dollars, his costs and disbursements in this action, having been heard at a General Term of this Court, now, on motion of Wm. D. Booth, Esq., for appellant, after hearing Ira D. Warren, Esq., for respondent—

Ordered, that the said judgment be, and the same is hereby reversed, vacated and set aside, and that a new trial be had in this action, with costs to the appellant to abide the event. 47

(A copy.)

James M. Sweeny,
Clerk.

SUPERIOR COURT.

HENRY D. PALMER,
Appellant,

against

ROBERT M. DE WITT,
Respondent.

December 12, 1870. Judgment of Reversal.

This cause having been brought on for argument, after
48 hearing Wm. D. Booth, Esq., for appellant, and Ira D. Warren for respondent, and an order having been entered on the 5th day of December, 1870, reversing the judgment herein and granting a new trial—

It is hereby adjudged, that the judgment herein be, and the same is hereby reversed, and a new trial granted, with costs to abide the event.

JAMES M. SWEENY,
Clerk.

SUPERIOR COURT OF THE CITY OF NEW YORK.

49 HENRY D. PALMER,
Respondent,

against

ROBERT M. DE WITT,
Appellant.

Please take notice, that the defendant appeals to the Court of Appeals from the order and judgment of the General Term of the Superior Court in this action, entered on the 12th day of December, 1870, and which order is
50 dated June 16, 1869, reversing the judgment of the Special

Term of this Court, entered on the 22d day of June, 1869, and granting a new trial in this case.

And the above named defendant, the appellant herein, hereby stipulates and agrees that, if such order be affirmed, judgment absolute shall be rendered against him in favor of the above named plaintiff and respondent.

Yours, &c.,

LARNED & WARREN,
Attorneys for Appellant.

To WM. D. BOOTH, Esq.,
Attorney, and
JAMES M. SWEENY,
Clerk. 51

SUPERIOR COURT OF THE CITY OF NEW YORK.

HENRY D. PALMER,
Plaintiff and Appellant,

against

ROBERT M. DE WITT,
Defendant and Respondent.

I, James M. Sweeny, Clerk of the Superior Court of the City of New York, having compared the annexed copy judgment roll and notice of appeal to the Court of Appeals in the above entitled action with the originals on file in this office, do certify that the same are correct transcripts therefrom and of the whole of said originals.

In witness whereof, I have hereunto subscribed 52
[L. S.] my name and affixed the seal of the Superior Court of the City of New York, this 12th day of December, A. D. 1870.

JAMES M. SWEENY,
Clerk.

SUPERIOR COURT.

HENRY D. PALMER

against

53 ROBERT M. DE WITT.

At Special Term, before GARVIN, *Justice*.

This is a motion to dissolve an injunction restraining the defendant from printing and selling printed copies of a comedy called "Play," of which the plaintiff claims to be the proprietor, by virtue of an assignment from the author. The motion is made upon the complaint and answer. It is alleged in the complaint, "prior to the first of February, 1868, one T. W. Robertson, of London, England, an eminent author, was the composer of a comedy called 'Play,' and
54 assigned to the plaintiff the exclusive right of 'enacting, representing upon the stage, printing and publishing, or causing, licensing or permitting to be enacted, performed, represented or produced upon the stage throughout the United States, in and to the said comedy, together with all the author's rights and privileges therein and thereto throughout the United States, and all benefits and advantages to be derived therefrom.'" That at the time of such assignment, purchase and sale, the said Robertson had a great reputation as a dramatic author, having produced some of the finest comedies introduced on the modern stage,
55 among them the comedies of "Caste," "Ours" and "Society" had been eminently successful. It is also alleged that any new comedy from such an author was of very great value to the exclusive proprietor thereof, and the plaintiff, in the purchase of the comedy of "Play," anticipated great pecuniary advantage from and by reason of the celebrity and popularity of its author. And the plaintiff avers that at the time of the purchase of "Play," on 1st of February,

1868, the said comedy was an unpublished composition,
adapted and designed for scenic representation, and was of
great literary and dramatic merit; that it had never been
at that time, nor has it been since, printed or published in 56
print by the plaintiff or its author, or by any one under his
sanction, permission or consent, or that of either of them,
and at that time had never been represented upon any stage;
that its first performance upon any stage was on the 15th of
February, 1868, in the City of London, at the Prince of
Wales Theatre, and under the sanction of the author, but
that the author did not thereby confer upon or abandon to
the defendant, or to any other person, the right or privilege
of printing his comedy or otherwise interfering with his
right of property therein; that the plaintiff, nor the author, 57
has never consented to the printing and publishing or sale
thereof; that on or about the 10th of February plaintiff re-
ceived a full and complete manuscript copy of the said
comedy, and still owns the same, and keeps it unprinted and
unpublished, and is now engaged in licensing the right to
perform and enact the same; that on the 18th of February,
1868, he published in the *New York Herald* a notice of his
right of ownership in said play, and had the same repeated
in said newspaper tri-weekly during the months of February
and March; that about the 25th of March, 1868, the de- 58
fendant, who is a publisher in the City of New York, with-
out the knowledge or consent of the plaintiff, and in wilful
disregard of his rights as proprietor of said play, did print,
publish and sell printed copies of the said play, and still
continues so to do, to the plaintiff's damage; and the plain-
tiff alleges that copies of the play so printed and sold are
identical with the comedy purchased by the plaintiff from
the author; that the plaintiff is liable to sustain irreparable
injury by reason of the facility which defendant has afforded
to the managers and actors to produce said comedy by means 59
of such printed copies.

The answer denies the plaintiff's proprietorship and any
wilful intention to injure the plaintiff; claims that the play
was publicly represented upon the stage in London a great
number of times, and that the defendant obtained the play

from those who saw and heard the representation as spectators, and that there was no prohibition in the theatres when the same was heard, nor upon the tickets of entry, against carrying away the same in the memory by those who saw
60 and heard it.

Mr. WARREN of Counsel for defendant.
Mr. BOOTH of Counsel for plaintiff.

GARVIN, *J.*—The plaintiff in this action claims to be assignee, purchaser, and sole and exclusive owner and proprietor throughout the United States of a comedy written by T. W. Robertson, an eminent English dramatic author, entitled "Play." The plaintiff purchased the comedy on or about the first of February, 1868, and received the copy of said play in manuscript on or about the ten-
61 th of February, and alleges the same has never been printed or published with the consent of the plaintiff or the author.

It was represented for the *first time* on the stage in London, at the Prince of Wales Theatre, on the 15th of February, 1868. That during the latter part of February and the whole of March the plaintiff had a notice published in the *New York Herald*, tri-weekly, of his right of ownership in the play. The defendant, on the 25th of March, in wilful disregard of the rights of plaintiff and without his consent, published and sold identical copies of "Play," thus
62 owned by the plaintiff, to his great damage and irreparable injury, and depriving him of all advantages and profits to be made thereby.

It is not pretended that either the plaintiff or the author had an American copyright in the comedy in question; neither could either have such a right; a foreign copyright would not avail the plaintiff here. There can be no copyright in a published work at common law; copyright exists only by statute. (Wheaton *v.* Peters, 8 Peters, 499.) The plaintiff must, therefore, stand upon his common law right
63 of literary property in "Play," as the assignee of the author to its exclusive proprietorship in the United States, with the

right to enforce it, as against others who claim to publish and circulate for their own profit and advantage. Two principles are well settled upon authority:

First.—The author of an *unpublished* manuscript has in it at common law an exclusive right of property, the violation of which may justly be protected by injunction. This is the language of the text writers, and the decisions upon the subject are uniform and clear. (8 Peters, U. S. R., 499; 4 Duer, S. C. R., 385.)

Second.—This exclusive right pertains only to the unpublished manuscript, without copyright protection; but, after unrestricted publication to the world, neither the author nor his assignee, whether a foreign or domestic writer, can assert an exclusive right to property in the future use and publication of the composition. The important question in this case is whether there was a publication or communication of the comedy by the author or his assignee. *Every communication, says Cadwalader, in Keene* v. *Clark, of a knowledge of the contents, unless restricted, of a manuscript, is more or less a publication.* And this able Judge further says, "An act which renders the contents of manuscript in any mode or degree an addition to the store of human knowledge is a publication." It has been expressly held by this Court, in Keene *v.* Clark, that at common law "the author or proprietor of an uncopyrighted literary composition parts with the right to the exclusive use and enjoyment of its contents by *communicating* them to others," without some concomitant reservation expressed or implied from the circumstances. This is holding, in other words, that an author has no exclusive property in a *published* work, or one communicated to the public, except under some statute (Wheaton *v.* Peters; Bartlett *v.* Crittenden; 5 McLean's, C. C. R.. 32).

The only question, therefore, is that of *publication.* As this question is presented the fact of foreign authorship can make no difference. There being no copyright interest plaintiff's case must rest upon his common law rights. After publication his exclusive right ceases to exist.

Such publication may be either by words, by w
printing in newspapers, magazines, or by lectures, ser
(oral or written), or by dramatic representation. If, in
67 of these modes, the public become possessed of the con
of a manuscript, without restrictions express or implied
must be regarded as such a publication as divests the au
of an exclusive property in the work, whatever it may
It is averred in the complaint that the comedy in ques
was represented on the stage on or about the 15th of F
ruary, 1868, in London. This one fact brings the
clearly within the rule laid down in the case heretofore
ferred to in this court. Doubtless, there was a serie
representations of the same play. There is no pretence
68 any restriction upon its use by those who witnessed the
presentation. A dramatic representation is publication
communication of the contents. If this is not a publicat
copyright would be worthless, compared with the comm
law property in and perpetual right to exclusive rep
sentation of any product of the author. The first is limit
to a few years, the latter would be perpetual; copyright
confined to the citizen and resident—the other applies to a
There is no valuable exclusive right in the works of
foreign author that can be enforced, not even in their r
69 publication, though by the custom of trade other publishe
refrain from publishing rival editions thereof.

The plaintiff avers a representation on the stage in Lon
don, and the defendant insists in his answer that "Play
was publicly represented upon the stage in London a grea
number of times, and that the defendant obtained it from
those who saw and heard the representation as spectators
and that there was no prohibition in the theatre where the
same was heard, nor upon the tickets of entry, against carry-
ing it away in the memory. The defendant denies any
wilful intention to injure the plaintiff. We must, therefore,
70 assume the defendant possessed himself of "Play" by means
not *unlawful* in themselves, through those who saw and
heard it represented in London, and published it in this
country. If the defendant had obtained a copy from a
printed book, magazine or newspaper, there can be no

doubt of his legal right to multiply copies and sell them to the public. How can there be any doubt of the same right in cases where he obtains the contents from those who learn and carry away in memory a comedy or play from seeing and hearing its unrestricted and unconditional representation upon the stage? All our national legislation, as well as that proposed for the benefit of foreign authors, proceeds upon the conceded principle that the work of a foreign 71
author brought here may be appropriated by any person without any compensation whatever being made to the author. This was conceded by the Committee of the Senate, in the report made in 1837 by its distinguished chairman, Mr. Clay, where an attempt was made to confer the benefits of our laws upon British and French authors. A bill accompanied the report, which failed. The enactments of Congress, passed in 1831, declared in effect that the only persons entitled to copyright shall be such authors as are citizens and residents, and their assignees, "and if the assignee takes his title before the author has come to reside, he takes from a person who is not within the privilege of the statute, and has nothing to confer." (Curtiss on Copy- 72
right, 143.) The ninth section of the same act prohibits the publication of manuscripts without consent, and authorizes the courts by injunction to restrain such publication of any manuscript; but the eighth section expressly excludes that section from any application to works written or composed by any person not a citizen nor resident of the United States, thus recognizing the principle in this country that when the foreign author communicates, without restrictions, the contents of his manuscript or work to others, he divests himself of his exclusive property in it. In other words, "the statute has taken away the common law rights deriv- 73
able from a non-resident alien as soon as the work is published." (Curtiss on Copywright, p. 143.)

All the title the assignee can have is the common law title to an unpublished manuscript, but in one lawfully made public he has no other title than such as the author possessed after publication. The main question in this case was substantially decided by this court in the case of Keene *v.*

Clark, 5th Robertson, 38; there it was expressly held "where the spectators of a public performance have not entered into some express or implied understanding with its proprietor, limiting the use they may make of the knowledge derived from being present at such performance, they *cannot be restrained as to the use by them* of so much of it as they can retain and carry away in their memory.

I do not see how this case can be distinguished in principle from that rule thus laid down.

The plaintiff has failed to make a case for the interference of the court by injunction. Courts must administer the law as they find it. This may be a case of great hardship for the plaintiff, but the remedy is to be found in national legislation. The same difficulty exists in relation to the publication of the uncopyrighted works of those who have enriched the world by their contributions to the literature of the republic of letters, as well as to those who publish editions of foreign authors; yet these defects in the legislation of the country have continued for many years. In the absence of any international law of copyright it is difficult to see how foreign authors, their assignees, or publishers of foreign literature can be protected. The injunction order in this case must be dissolved, with $10 costs.

HENRY D. PALMER

vs.

ROBERT M. DE WITT.

APPEAL FROM A JUDGMENT ARGUED AT THE JUNE GENERAL TERM, 1869,

Before *Justices* MONELL, JONES and FREEDMAN.

This action was brought to obtain an injunction restraining the printing and publishing by the defendant of a drama or comedy called "Play."

The complaint alleged that immediately prior to February,
1868, T. W. Robertson, of London, England, the author of
the drama, sold to the plaintiff the exclusive right of per- 77
forming the drama upon the stage, and printing and pub-
lishing the same within and throughout the United States.
That at the time aforesaid the drama was an unpublished
composition, and had not been, nor had it since been printed
or published in print by the author, or by any one with his
consent; or by the plaintiff or by any one with his con-
sent; nor had it since the first of February, 1868, been
printed or published in print by the plaintiff or by any one
with his consent. That the drama had not been produced
or publicly performed on any stage in this country, or else-
where, until subsequent to the sale thereof to the plaintiff, 78
and that the first performance thereof was on the fifteenth day of February, 1868, *in the City of London, at the Prince of Wales Theatre, and under the sanction of the author*; but that
the author did not thereby confer upon or abandon to the
defendant, or to any other person, the right of printing or
publishing the drama. That on the tenth day of February,
1868, the plaintiff received from the author a manuscript
copy of the drama, in consummation of the aforesaid pur-
chase.

The complaint then alleged that the defendant, without
the knowledge or consent of the plaintiff, and in disregard 79
and in violation of his proprietary right, had printed and
published and offered for sale printed copies of the drama.

The answer of the defendant, after denying (among other
things) that the author, by its public representation in Lon-
don, did not thereby confer upon or abandon to the defend-
ant or to any person the right or privilege of printing or
publishing the drama, alleged, upon information and belief,
that the drama was, during the months of February and
March, 1868, with the sanction of the author thereof, many
times publicly performed or represented in the presence of 80
large audiences, at one or more of the principal theatres in
London, England, and that the tickets admitting the spec-
tators to said performance contained no notice or prohibition
against carrying the said comedy away, by memory or

otherwise, and using, printing or publishing the same, and
was any notice to that effect posted in any of the theatres
in view of the spectators.

And the defendant alleged that he received the words of
the comedy and description of the arrangement, general
stage directions and divisions of acts and scenes, as published
81 by him, *from one or more persons, who obtained the same from
its performance on the stage at such public representations, while
witnessing the same as such spectators.*

The action was tried by Mr. Justice Monell, without a
jury, who rendered judgment in favor of the defendant,
dismissing the complaint with costs, assigning as a reason
therefor that the action had been tried (upon substantially
the same facts as were before the Court at Special Term on
a motion to dissolve the injunction, and that, as upon such
motion, the questions involved had been examined and the
injunction dissolved, he felt bound by such decision.

The Justice found the following facts:

82 *First.*—That on and prior to the 1st day of February,
1868, one T. W. Robertson, a resident of London and citi-
zen of Great Britain, was the sole author and composer of
the drama mentioned in the complaint, called "Play."

Second.—That on said 1st day of February, 1868, the said
Robertson, for a valuable consideration, executed and de-
livered to the plaintiff a certain instrument in writing, by
which he sold, assigned and set over to the plaintiff in this
action the exclusive right and privilege of printing and
publishing, enacting, performing, respresenting and pro-
83 ducing on the stage, licensing or permitting to be printed,
published, enacted, performed, represented and produced on
the stage, within and throughout the United States, the said
drama, called "Play," together with all his rights and pri-
vileges therein and thereto, as the author thereof, through-
out the United States, and all benefits to be derived there-
from, and delivered to the plaintiff the manuscript of said
drama.

Third.—That prior to the 15th day of February, 1868, the comedy of "Play" had not been printed, published or performed. 84

Fourth.—That on the 15th day of February, 1868, and for a great number of times thereafter, the said comedy was publicly performed and represented at the Prince of Wales Theatre, in the city of London, *by and with the sanction of the said T. W. Robertson*, in the presence of large audiences; and that the tickets admitting spectators to the performance, which were purchased by them, contained no notice or prohibition against carrying the said comedy away, by memory or otherwise, and using or printing the same, nor was any notice to that effect posted in said theatre in view of such spectators. 85

Fifth.—That the defendant received the words of the comedy, and a description of the arrangement, general stage directions, division of acts and scenes, as printedby him, from one or more persons, who had seen or heard the same publicly performed, at said public representation in England.

Sixth.—That on the 25th day of March, 1868, the defendant printed and sold certain printed copies of the said comedy, identical in all respects with the plaintiff's copy, and still openly offers for sale and sells copies of said comedy. 86

Seventh.—That by reason of the acts of the defendant the plaintiff has sustained damages incapable of computation, in not having the exclusive sale of said comedy.

The conclusion of law was that the defendant was entitled to judgment—that the complaint be *dismissed* with costs.

From the judgment entered thereupon the plaintiff appealed.

W. D. Booth,
for Appellant.

Ira. D. Warren, 87
for Respondent.

By the Court.—MONELL, *J.*

In examining the questions in this case I no longer
controlled by the decision made at Special Term dissolv
the injunction, which had been temporarily granted in
action; and unless that decision is founded on principle
sustained by authority, it is not improper for this Court
disregard it.

In deciding the motion for a temporary injunction wh
88 was made at Special Term, 7 Robt., 530, S. C. 5; Abbott,
R. N. S., 130, the learned justice was unable to distingu
the case from that of Keene *v.* Clark, 5 Robt., 38. He sa
(p. 537, 141) "the main question in this case was subst
tially decided by this Court in the case of Keene *v.* Clark.
There it was expressly held, "when the spectators of
public performance have not entered into some express
implied understanding with its proprietor, limiting the u
they make of the knowledge derived from being present
such performance, they cannot be restrained as to the u
by them of so much of it as they can retain and carr
89 away in their memory." And the learned Justice says: "
do not see how this case can be distinguished in princip
from the rule thus laid down."

The case of Keene *v.* Clark had been decided, and the
opinion, from which the foregoing was quoted, had been
published before the defendant's answer in this action was
prepared, and it was intended to bring this case within the
dictum contained in that case, by alleging the *public performance* of the play in London, without notice or prohibition
against carrying away the comedy with stage directions and
divisions of acts and scenes, and procuring the same from
90 one or more persons, who had obtained the same from its
performance while witnessing the same as spectators.

If the questions in the case of Keene *v.* Clark required or
even authorized the *dictum* which has been quoted, and
which controlled the decision at Special Term, it would
conclude us upon this appeal. The defendant has brought
himself clearly within the principles laid down in that case,
and whether that decision meets our approbation or otherwise, it must be regarded as the law of this Court until re-

versed by a higher tribunal, unless upon examination it shall be found that so much of the decision as has been regarded as authority was *obiter dictum*.

Having been a member of the Court which pronounced 91
the decision in Keene *v.* Clark, and dissenting as I did from such decision, I am prepared to say that, in my judgment, there were neither facts nor questions in the case which required or allowed the decision to be placed upon any such ground as is embraced in the opinion of the Court. To establish this and to explain what might otherwise be thought to be a disregard of the decisions of my own Court, a somewhat lengthy statement of that case is necessary.

The action was brought by Miss Keene, who claimed to be the owner by purchase from the author of the play called "Our American Cousin," which was an unpublished 92
manuscript, never having been acted or represented in public, nor printed nor published by the author, who was the literary proprietor of it, and to whose right she claimed she had by purchase succeeded.

She then alleged that she had produced the play at a certain theatre in the City of New York, having made additions, alterations and verbal changes in it.

The defendant, from whom she sought to recover damages for performing the play at another theatre, alleged that the play had, previous to its enactment by him, been published and acted, and represented and dedicated to the 93
public constantly and frequently, at various times, in various theatres of the United States and elsewhere, during the period of five years previously.

On the trial, which was *before a jury*, evidence was given of the performance of the play at various places in the United States, the British provinces and Australia, both with and without the authority of Miss Keene. (A question to one of the defendant's witnesses—"how often and where the play was acted by the defendant"—was excluded, and an exception taken.) A verdict was directed for the plaintiff, and the exceptions sent to the General Term to be there 94
heard in the first instance. No request was made to sub-

mit to the jury any question of fact. The Justice w
tried the action decided that, upon the facts as shown,
plaintiff was entitled to recover.

There were five exceptions only which could be exam
at the General Term, namely: the *one* already sta
second, to excluding evidence of the amount one of p
tiff's witnesses had paid her when he performed the p
third, to refusing to charge the jury that there was no
dence that the plaintiff had sustained any thing but nomi
damages; *fourth*, to the direction to find a verdict for
95 plaintiff for the amount proved to be the defendant's sh
of the net profit; and *fifth*, to the motion to dismiss t
complaint on the ground of the defendant's not being
manager.

Where exceptions are heard in the first instance at
General Term, the questions of fact are not open to revie
and, as found by the jury, are conclusions. The Cou
cannot, in such case, set aside a verdict, as being against th
weight or contrary to the evidence, the power of the Cou
being confined exclusively to an examination of the que
96 tions of law presented by the exceptions taken at the tria

It will be seen from the foregoing statement of the cas
that none of the "exceptions" involved the necessary o
proper consideration of any question of fact, unless the
exception to the direction to find a verdict for the plaintiff
was sufficient to enable the Court to look at the evidence
with the view of ascertaining if there was any error in such
direction. It may be said, however, of that exception, that
it was too general to entitle it to be heard, and should there-
fore have been excluded.

The exceptions taken in the order stated called upon the
97 Court to say whether there was error as *matter of law—first*,
in excluding evidence of the number of times defendant had
acted the play; *second*, of the amount paid for a license
to act the play; *third*, in not dismissing the complaint be-
cause there was no evidence of damage, and last, in direct-
ing a verdict for the plaintiff. In the latter exception it
must have been assumed that the evidence established that
the plaintiff was the proprietor of the play; that she had

not dedicated it to the public nor published it, and that the defendant, by acting it without her consent, was liable in damages. The ownership of the original manuscript of the play, and the numerous times in which and various places 98
where it had been publicly performed were undisputed facts; but the Court, in directing the verdict of the jury, undoubtedly held that such frequency of performance did not of themselves, whether with or without her consent, deprive the plaintiff of her proprietorship in the play. Had those facts, or either of them, been in dispute, and had the attention of the Court been called to them by a request to submit such facts to the jury, the question might fairly have been presented.

No such request, however, was made, and it could not be urged for the first time on the appeal, or on the hearing of 99
exceptions, that there was error in withholding from the jury questions of fact proper for their consideration.

If, nevertheless, the decision of the case had been put on the ground that the undisputed evidence of the frequent performance of the play in various places was a publication of the play, or a dedication of it to the public by the plaintiff, whereby she had lost her exclusive proprietorship in it, and therefore she could not recover, I should feel bound to follow it, so far as it could be made applicable to the facts of this case.

But I do not understand the decision was placed upon 100
any such grounds. It is true the learned Chief Justice who wrote the opinion thought there was sufficient evidence, and that it ought to have gone to the jury to say whether the plaintiff had not surrendered the play to the public. But, as matter of law, the case does not hold that such frequent performance was either a publication or a surrender to the public; so that it would be no violation of any right of ownership in the plaintiff for any person to obtain the play in any way, and publish it in print. At most, it is held 101
that whether such frequency of performance was a publication, or would justify a presumption of surrender, were facts for the jury to decide; and the Court does not decide them as matter of law. The ground, therefore, upon which the

case was decided was, that it is not unlawful for a spect
to carry away in memory and give to the world an un
lished literary production, the performance of which he
witnessed, or to the recital of which he has listened.
publication by the author, either in fact or by frequenc
performance, is required to make it lawful to publish f
memory; for a single performance or one delivery of a li
ary production may suffice as well as a hundred.

102 The learned Ch. J. says (p. 59) "A limited comm
cation of a literary or musical composition by private l
tures, recitations, or its performance, has been held no
surrender its proprietorship to the public. * * * But in
case of a public theatrical performance, the public are h
entitled to make use of that faculty which is necessarily
dressed by such representation, to wit, the memory, for t
purpose of repeating the contents of the play, even in p
forming it elsewhere, when the owner has laid no restra
upon such use of the knowledge so obtained, and retain
by memory only."

103 There is nothing, therefore, in the decision of Keene
Clark to prevent an examination of the question now bef
us; and we need not be embarrassed, in the consideration
the case, by views so ingeniously expressed, but whic
could be applicable only to a different case than was mad
at that time.

The case now before us was tried without a jury, and a
the facts have been specially found by the Court. The a
plication of the law must be to such facts, and upon them
we are to determine whether the judgment below is correc

104 Whatever may have been the conflict of judicial opinion
upon the effect of copyright law upon the common law
rights of authors, it has never been disputed that, by com
mon law, an author has, until publication, a property in hi
literary work capable of being held and transmitted, and
in the exclusive possession and enjoyment of which he and
his assignees will be protected.

This has been settled by a long series of decisions. Mil
ler *vs.* Taylor, 4 Burr., 2303; Donaldson *vs.* Beckett, Id.
2408; Beckford *vs.* Hood, 7 Tenn. R., 616; Woolsey *vs.*

Judd, 4 Duer., 389; Stone *vs.* Thomas, 2 Am. Law Reg., 105
228; Roberts *vs.* Myers, 23 Law Rep., 396; Keene *vs.* Wheatley, Id., 440; Bourcicault *vs.* Wood, 16 Am. Law Reg., 539; Jones *vs.* Thorne, 1 N. Y. Leg. Obs., 409.

It was at one time somewhat questioned in England whether such common law right did not continue *after* publication, and was neither restrained nor taken away by the Statute of 8 Anne; but in Donaldson *vs.* Beckett, supr., the House of Lords held that the statute had taken away such common law right, leaving authors without protection, *after* 106
publication, except under the statute. And the same view of the effect of *our* statute of copyright is taken by the Supreme Court of the United States in Wheaton *v.* Peters, 8 Pet., 498-661. It was there held that the Acts of Congress of 1790 and 1802 were not passed in reference to any existing right, but to originate a right *after publication* by securing to authors under its provisions "the sole right and liberty of printing," &c. To the same effect is the case of Dudley *v.* Mayhew, 3 N. Y. R., 9. But the statutes of copyright in England and in this country do not, as I think, 107
in any manner affect the common law ownership of literary compositions *before* publication; and I am therefore of the opinion that, *until* publication, an author and his assignees has a proprietary right in his production, of which he is not deprived by the statute, and which the Court will protect against invasion.

Let me, however, pursue this inquiry a little farther.

A reference to the Acts of Congress will be sufficient to show, I think, that it was not intended to affect the common law right.

The first section of the Act of Feb. 3, 1831 (by which 108
Act all previous Acts were repealed), provides that authors, on complying with the provisions of the Act, shall have "the sole right and liberty of *printing*, representing, publishing and vending their books; and the fourth section declares that no person shall be entitled to the benefit of the Act unless he shall, *before* publication, deposit a *printed* copy of the title of the book in the Clerk's office of the District Court; and the ninth section provides that if any per-

109 son shall print or publish any *manuscript* whatever, with
the consent of the author or proprietor, he shall be liable
damages and may be restrained by injunction. It is evid
that Congress intended to furnish protection to authors, a
to secure them from wrongful appropriations of their work
by providing a means of *continuing* in effect their comm
law right *after* publication, and not to wholly deprive the
of such common law right. For it is, as we have seen, we
settled that such right ends with publication, whatever th
may be. It is, I think, also equally clear that the onl
publication contemplated by the framers of the copyrigh
law is a publication *in print*, and not in any of the othe
110 modes which have been suggested.

The language of Act is: may *print, reprint, publish and vend.* First he may *print*, and then he may publish and vend. To secure this privilege he must deposit a "*printed*" copy of the title page, and that must be done before publication. Baker *vs.* Taylor, 2 Blat. chf., 85. So that he must print at least the "title page" before he can secure the protection of the Act. If the Act gave merely the exclusive right to print, without securing also the exclusive right to publish the printed matter, it would be of no value to authors. So that it is evident that, in view of the common
111 law right of authors existing and recognized at the passage of the Act, and the settled belief that such right continues until actual publication or dedication by the author, Congress merely intended to enable authors to retain their proprietorship after printing and publishing. In the case of Baker *v.* Taylor, *supra.*, printed copies of the book had been sold before the deposit in the Clerk's office, which was held to warrant the inference of actual publication so as to defeat the application for a copyright, and it is intimated that the publication contemplated by the Act was publication in print.

112 This view is strengthened by the ninth section, which expressly protects the proprietorship of a manuscript, and makes it unlawful to print or publish it without consent. If it had been intended to destroy the common law right, and to require in all cases a copyright to secure the ownership

of an unpublished work before printing, then the provisions of the ninth section are wholly inconsistent with such intention, as by that section the common law right is recognized, continued and preserved.

This view of the statutes is in accordance with Bartlett *v.* Crittenden, 4 McLean, 301, and 5 Id., 36; Putte *v.* Derby, Id., 332; Little *v.* Hall, 18 How. U. S. Rep., 170.

The supplementary Act of August 18, 1856, extends to 113
authors of "dramatic compositions" the same protection as is afforded to authors of other works by the Act of 1831, and in addition to the sole right to print and publish they are given the sole right to act, perform and represent such compositions, or to cause them to be acted, performed and represented, on any stage or public place, during the period for which the copyright is obtained.

In extending the privileges of the copyright law to dramatic compositions it was necessary to secure to authors not alone the right to print and publish, which is of little comparative value, but also the sole right to act and represent, which constitutes their chief value; and which right, 114
unless expressly protected by statute, would not continue after printing and publishing. The Act of 1856 contains also a prohibition against representation of copyright plays without the proprietors consent, similar in terms to the 9th section of the Act of 1831. The proviso in the Act of 1856, that nothing therein shall impair any right to act a dramatic representation, which right shall have been acquired by any manager, actor or other person previous to the securing of the copyright, very clearly recognizes rights acquired previous to application for copyright, and continue s thecommon law rights of proprietors, and is in accor 115
dance with what was said in Wheaton *v.* Peters, 8 Pet., 591, 662, that, independently of the copyright law, an assignee of the manuscript would be protected by a Court of Chancery.

In respect to the Act of 1856, Sprague, *J.*, says in Roberts *v.* Myers, 13 Mo. Law R., 397, that the prior act secured to

116 authors the exclusive right of printing and publishing, and it was only because publication did not embrace acting or representation that such act was passed, superadding that exclusive right to those previously enjoyed. This reference to and examination of the copyright laws, and of the cases cited, leave it free from doubt that such laws are merely ancilliary to the common law rights of authors, and continue them after publication in print, but in no way impairing such rights, so long as the literary composition remains in manuscript, or is not printed; and in the case of dramatic compositions, superadding the sole right to represent after
117 publication.

Whenever an author gives his composition to the public he looses his exclusive right to its publication, unless protected by the copyright laws. Hence, where the common law right of property of an author is invaded, the sole questions involved are, first, has there been a publication, so as to take away or put an end to such common law right; and second, has such publication been with the consent or by the authority of the author?

It will not, I think, be claimed that an unauthorized or
118 surreptitious publication in print of a literary composition before publication by the author would defeat the owners right of property, and leave him without protection. If that was so the copyright laws would, in such case, give no security, inasmuch, as the benefit of the statute can be obtained only before publication. Whether any surreptitious publication, otherwise than in print, can deprive an author of his property will be examined hereafter.

The fact found in this case, which it is claimed was a publication of the play in question, was, that on the 15th
119 day of February, 1868, and for a great number of times thereafter, the comedy was publicly performed and represented at the Prince of Wales Theatre, in the city of London, by and with the sanction of the author. It was not found, nor was there any evidence, that the comedy had ever or anywhere been represented without the sanction of the author, or that it was ever put in print by him, or by his authority. The only "publication," therefore, which can

be claimed was its public representation at the theatre on various occasions and in the presence of large audiences.

It was not claimed on the argument, but was conceded, 120
that the number of public representations of the play was not material upon the question of actual publication; and it was contended that one public performance was sufficient to deprive an author of all proprietary right. The concession, however, did not go to the extent that a single, or indeed a great number of public performances, conducted under the authority of an author, would justify a felonious obtaining of the manuscript for purposes of printing and publishing. Yet it necessarily, I think, goes to that extent; for, as I shall presently endeavour to show, the right of 121
obtaining the manuscripts, or of its contents, does not depend upon the manner of procuring it, but upon whether the author has parted with his rights by actual publication.

The value to an author of his literary composition, beyond the fame that it secures him, is in the amount of money it returns; and the amount of money he gets depends chiefly upon the appreciation of the public. If a composition never comes to the knowledge of the public the author does not obtain either their applause or money. It might as well never have been created, as to lie in the 122
author's drawer unread. Such is the definition of literary property as given in Keene *v.* Wheatley, *supra*, namely, the right which entitles an author or his assignees to all the use and profit of his composition. The property, therefore, which a composer ordinarily has in his composition is the pecuniary value it is to him, and not the amount of fame he may acquire; and such pecuniary value is necessary and wholly dependent upon the means which he may lawfully employ to bring his productions before the public, and the approval of the public of his work; and there is no 123
other property in that description of literary composition. When a right of property in the invention or creation of an author is recognized as an inherent right by the common law, it assumes that the thing to be secured and protected is of value to the owner. The law does not regard as property a thing entirely worthless.

If a literary composition, therefore, derives its value from and becomes property because of the use which can be made of it before the public, and such value is increased or di-
124 minished in proportion to the extent of its use, then it becomes very important to know where and when the authors literary property in it terminates. To give it value or to make it property recognized by the common law, the author must be allowed to use it before the public; and if, having submitted it *once* to a public hearing, it is to be deemed a publication, so as to take away the proprietary right, and to deprive the author of the benefit of copyright laws, then obviously the common law means nothing, and there is no such thing as property in literary work.

Can it be said that once delivering a lecture upon a
125 scientific or literary subject, before a public audience, will forever thereafter deprive the author of his property in the ideas invented or created and which represent, by a combination of words, his meaning?

If so, then any one who can obtain the manuscript or access to it, or who by employing the art of stenography, or by the exercise of memory, can carry it out of a public lecture room, may, without the consent or knowledge of the author, appropriate and use, for his own emolument, the literary production of another person.

I cannot believe there is so little foundation for or so nar-
126 row a limit to the proprietary rights of an author in his literary labors.

I believe the law intended to secure to him the *beneficial* results of his labors, and to protect him from any piratical invasion of his rights until he has done some act inconsistent with an exclusive ownership, or which shall amount in judgment of law to a publication.

There can be no fixed rule determining when an author has surrendered his literary property. Printing his composition and giving it public circulation would fix the period
127 of surrender in such a case; but one reading of a manuscript lecture, or one performance of a manuscript play would not. And if one does not, what greater number can it be said will?

The value to the author of a lecture or of a play, who derives emolument from its delivery or representation before public audiences, is not limited to one performance. It may extend to any greater number, and the hundredth performance may bring more ample returns than the first. So that it may fairly be assumed that it is not intended in any case to surrender property in a literary composition, so long as the author of it retains it in manuscript and uses it 128
before the public for his private pecuniary benefit.

Therefore, I think there can be no presumption against literary ownership arising from the mere frequency of performance. Such performances are not inconsistent with a continued proprietorship, but are wholly consistent with and necessary to the enjoyment of the property.

The question of what constitues publication is not much enlightened by any of the adjudicated cases which have come under my observation. Most of the cases involve considerations arising from copyright laws, and do not under- 129
take to determine when or in what manner an author may be said to surrender his property in his literary work.

The case most relied on by the defendant (Boucicault *v.* Delafield, 33 Law Jour. N. S., ch. 38) arose under the English statute of copyright. That statute provides that *one* public representation or performance of any dramatic piece shall be deemed sufficient in the *construction of the Act* to be a publication of the work. It was accordingly held in an action to recover a penalty imposed by the statute, that public performance of the drama in the United States before taking out a copyright in England was a publication *within the statute.* Words used in a statute to de- 130
fine the meaning of particular parts of it are never extended beyond the statute, and have therefore no controlling effect except in the interpretation of the statute. They define the intent and meaning of the law-makers, and are made to extend the statute to cases not otherwise recognized as coming within its perview. But the Legislature cannot, by merely expressing the intent of the law in respect to a particular statute, affect the meaning of words used in other statutes, or deprive them of the significance which they receive from

131 settled principles of the common law. The definitions in the Code of Procedure (§ 462, *et seq.*) it will not be pre tended are conclusive of the meaning of the words excep within the statute.

The case, therefore, of Boucicault *v.* Delafield is not au authority upon any question of actual or constructive pub lication not arising under the English copyright law, nor is it entitled to any more weight than the statute itself, which is a mere legislative interpretation of what, for *certain pur poses*, shall be deemed a publication of a dramatic piece.

132 Our statute of copyright has no such exception as is con tained in the Statute of Anne; and the word "published," in the statute, has been interpreted to mean published in *print*. Keene *v.* Wheatley, 9 Am. Law Reg., 92. In the case last cited a bill was filed in the Circuit Court of the United States to restrain the performance by the defendants of a manuscript play, which was claimed to be the literary property of the plaintiff. The case turned upon the evi dence of the manner of obtaining the play by the defend ants; and it was held that as it appeared that the plaintiff's

133 own theatrical representations of the play were not the means through which the defendants were enabled to repre sent it, they should be enjoined. Judge Cadwalader, in his very elaborate opinion, asserts the doctrine—at least, so far as this, that public representations of a play may be a publi cation, so as to authorize an auditor to produce it from memory, although he denies the right of a reporter to note the words—a distinction not very clearly defined. This point, however, was not necessary to a decision of the case, and the *dictum* may therefore be rejected.

134 Upon the subject of publication, I will here refer to some of the cases either holding or sustaining that a representa tion of a play is not necessarily a publication of it, so as to deprive the author of his property in it.

Judge Sprague so held in Roberts *v.* Myers, 23 Monthly Law Reg., 396. He said it was not a publication within the meaning of the copyright law, and did not prevent an au thor obtaining a copyright.

It is affirmed by Judge Hoar, in Keene *v.* Kimball, 23 Mon. L. Rep., 669, where he says "the representation of a dramatic work upon the stage is not a publication *which will deprive* the author or his assignees of their right of property." 135

In Bartlett *v.* Chittenden, 4 McLean, 300, 5 Ibid, 32, it was held that the author of a lecture did not dedicate the manuscript to the public by using it for the purpose of instructing others. That case went farther, and decided that an author did not abandon his right in his composition by permitting pupils or friends to take copies, and that such copies could not be used in any way not contemplated by the author.

And in Blunt *v.* Patten, 2 Paine, 397, a deposit by the author of his work in a public office, such as a chart in the Navy Department, was held not to make it a public document which any one might copy. 136

And again in Boucicault *v.* Wood, 16 Am. Law Reg., 539.

In a very recent case (Crowe *v.* Aiken, not reported), decided by Judge Drummond, in the Circuit Court of the United States for the District of Illinois, an injunction was asked for to restrain the representation by the defendant of the play called "Mary Warner." The play was written by Mr. Taylor, for Miss Bateman, and the manuscript was transferred to the plaintiff. It was publicly represented in London and in the United States, but was not printed. The defendant alleged that the play was obtained from a person in London, who procured it from repeated representations on the stage at the Haymarket Theatre, and that there was no *restriction* against any of the spectators using such play as they saw fit. After a lengthened examination of the questions the Court decided to grant the injunction. In the opinion the ground is distinctly taken that a representation is not a publication, and any manner of obtaining it without the consent of the author or owner, "except by memory," is a violation of his proprietorship. 137 138

As far, therefore, as this case depends upon an actual or constructive publication of the play by the plaintiff or

his assignees, the clear weight of authority is that public
representation is not publication, and does not entitle any
person, without the author's consent, to procure it in any
way for purposes of publication, except, perhaps, when it is
139 procured by means of the memory alone.

I am aware that, in the case of Keene *vs.* Wheatly, *supra*,
which is followed by Keene *vs.* Clark, *supra*, and again by
Crowe *vs.* Aiken, each of the learned Judges lean to the
opinion that an auditor may use his memory as a means
of procurring a represented play, and may lawfully print
and publish it. The reason seems to be, that as there can
be no power over or restriction of the use of the memory,
therefore such use in not unlawful.

It is enough, however, perhaps, for the present case to say
140 that, even if it is true that an auditor at a public representa-
tion may lawfully carry away the play in his memory and
afterwards put it in writing, and from such writing print
and publish, there was no evidence in this case to bring it
within that rule. The finding of the Court is that the de-
fendant received the words of the comedy, &c., from one or
more persons who had seen or heard it performed. That
finding is not enough to justify the conclusion, that the per-
son or persons who saw or heard the public performance,
had brought it in their memories from the theatre.

141 The burthen of proving the manner in which the play
was procured was upon the defendant, and he was bound
to show that he had obtained it in a lawful way. There are
no presumptions in his favor. The right of the plaintiff, as
owner before publication, was absolute, and could be de-
feated only by showing that the defendant had obtained the
play through the memory of an auditor. This is the result
of the learned opinion of Judge Cadwalader in Keene *vs.*
Wheatley, *supra*, in which view he has fortified himself by
the citation of many cases; and also of Judge Drummond,
142 in Crowe *vs.* Aiken, *supra*.

But I am compelled to dissent from the opinions of the
learned judges in those cases, so far as it is intimated that
a spectator may, upon witnessing the public performance
of a play, rightfully commit to memory and then publish it

to the world; and also from a somewhat qualified view of the same character, entertained by the learned late Chief Justice of this Court, and expressed in his opinion in Keene *vs.* Clark, *ubi supra*.

It seems to me that any surreptitious procuring of the literary property of another, *no matter how obtained*, if it was unauthorized and without the knowledge or consent of the owner, and obtained before publication by him, is an invasion of his proprietary rights, if the property so obtained is made use of to his injury. Each of the learned justices admit that a play cannot lawfully be taken down by a short hand writer from the lips of the actors during a public performance. 143

If taken thus by a stenographer is it different in its legal effect and resulting consequences from committing to memory and afterwards writing it out? In principle it is not. They are only different modes of doing the same thing, and, if without the author's consent, are alike injurious to his interests. The objection is not to the committing a play to memory, for over that no Court can exercise any control, but in using the memory afterwards as the means of depriving the owner of his property. Such use, it seems to me, is as much an infringement of the author's common law right of property as if his manuscript had been feloniously taken from his possession. I can see no difference. 144

In the case of Prince Albert *vs.* Strange, Q. De G. and Sma., 652, a workman employed to take impressions from copper plates of etchings made by the plaintiff, not intended for publication, took impressions for himself and sold them to the defendant. It was held an infringement of the plaintiff's proprietary right, and an injunction was granted and the impressions ordered to be destroyed. 145

The pleadings and proofs in this case were shaped so as to bring it within one of the propositions of the learned late Chief Justice in Keene *vs.* Clark, and it is accordingly found as a fact that the tickets admitting spectators to the performance contained no notice or prohibition against carrying the comedy away, by memory or otherwise, and using and printing the same, nor was any notice to that effect posted in the theatre in view of the spectators. 146

Whatever means a prudent man may adopt to prevent his property from being feloniously taken from him, it cannot, I think, be successfully contended that, if he chooses to take the risk, he may not leave it exposed without mark or other sign to designate it as his property, or that by thus exposing it he would lose his title, and could not afterwards recover it or its value from one who tortiously took it.

A wrongdoer cannot get title to property, or escape the
147 responsibility of his tortious or felonious act, merely because the owner has failed to give public notice or warning that it was not to be stolen.

If carrying away in the memory of a spectator, or otherwise surreptitiously obtaining the contents of a play, is without the consent of or unauthorized by the owner, and therefore an infringement of his property in the play, the act is not excused by the omission of the owner to notify the audience that they will not be allowed or are forbidden to carry it away in that manner.

148 Upon a careful consideration, therefore, of the subject, I have not been able to appreciate the distinction which the learned judges in Keene *vs.* Wheatley, and Keene *vs.* Clark, and Crowe *vs.* Aiken, have attempted to draw between different modes of obtaining the contents of a manuscript play from its public performance. They are equally objectionable, and are merely different modes of depriving an author of his literary property, and therefore any *mode* which effectuates that purpose is unlawful. The Vice-Chancellor says, in Prince Albert *vs.* Strange, *supra.* (p. 689), that as to property of a private nature, which the owner, without infringing on the right of any other, may and does retain in
149 a state of privacy, a person who, without the owner's consent, express or implied, *acquires a knowledge of, cannot lawfully avail himself of the knowledge so acquired* to publish without his consent a description of the property.

That opinion goes quite as far as is necessary to destroy the distinction alluded to.

There is another case to the same effect. In Turner *v.* Robinson, 10 Irish Chy., 132, a painting on public exhibition for private emolument was seen by spectators, some of

whom, from *recollection*, arranged themselves in *tableau* representing the figures in the painting and were photographed. The sale of engravings made from such photographs was restrained by injunction. The mode adopted for carrying into execution what was denounced by the Court as an unlawful act was the same in the Irish case as was approved of in two cases alluded to, namely, in the memories of the spectators; and the case is therefore opposed as an authority to the distinction referred to. 150

My conclusions upon the whole case are, that there was no such publication by the plaintiff or by his assignor of the play in question as to deprive the plaintiff of his common law right of property in it. That public representations of the play were not a publication of the play so as to take away such common law right. That there is no presumption in favor of the lawfulness of the manner in which the defendant obtained the play. That the burden is upon him to show that it came into his possession in a lawful manner; and that, having failed to show the lawfulness of his possession, he should be deprived of it. 151

I am, therefore, of opinion that the *plaintiff* is entitled to a *judgment restraining* the defendant from further printing or publishing the play, and requiring him to deliver up to be destroyed such as are now in print, and that, therefore, the judgment appealed from should be REVERSED.

We were asked by the appellant's counsel, if we came to the conclusion that the judgment below was erroneous, to pronounce an absolute judgment in his favor, and not to send the case back for a new trial; but, in the uncertainty of the law on the subject, we think it safest to refuse the request. 152

The judgment should be REVERSED and a NEW TRIAL ordered, with *costs* to the appellant to abide the event.

Mr. Justice Jones dissented.